TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 200

AIDA S. KOVACS, PETITIONER,

vs.

GEORGE A. BREWER, SR.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

PETITION FOR CERTIORARI FILED JUNE 18, 1957
CERTIORARI GRANTED OCTOBER 14, 1957

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[fol. 1] No. 168—Sixth District

IN SUPREME COURT OF NORTH CAROLINA

Spring Term 1957

From Northampton

AIDA S. KOVACS, Petitioner,

v.

GEORGE A. BREWER, SR., Defendant.

Before Stevens, J., in Chambers at Halifax in the Sixth District, December 10, 1956. Petitioner appealed.

STIPULATION OF COUNSEL RE JURISDICTIONAL FACTS

It is stipulated and agreed by petitioner and defendant through their respective counsel of record that upon hearing of this cause the court below was properly constituted and that the parties were at all times duly before the court; that summons was duly issued on the 23rd day of February 1956 and duly served on defendant on the 29th day of February 1956; that both the petition and answer were duly verified; and that the summons and the captions and verification of the pleadings need not be printed as a part of the record or case on appeal.

IN SUPERIOR COURT OF NORTHAMPTON COUNTY, STATE OF NORTH CAROLINA

PETITION

Your petitioner above named respectfully represents to the court:

[fol. 2] 1. That this proceeding is brought under the provisions of Section 50-13 of the General Statutes of North Carolina, respecting the determination of disputes concerning the custody of children whose parents are divorced

by decree of courts of states other than the State of North Carolina; and is brought by the mother, petitioner herein, against the paternal grandfather of said child who is now exercising physical custody of and control over said child; and that said proceeding is instituted in the County of Northampton for that the said child is resident therein.

2. That on April 18, 1945, your petitioner and George A. Brewer, Jr., son of the defendant herein, were married in New York City. That on May 30, 1946, a child, Jane Elizabeth Brewer, was born to them, and that said child was the only child born of their marriage.

3. That on July 31, 1950, George A. Brewer, Jr. instituted suit for divorce against this petitioner in the Supreme Court of the State of New York in and for the County of New York, the same being a court of competent jurisdiction for such purpose; and that on January 17, 1951, said Court entered a decree of divorce in favor of George A. Brewer, Jr., against the petitioner herein, and awarded custody of the child, Jane Elizabeth Brewer, to the defendant, George A. Brewer, Sr., paternal grandfather of said child, and then and now a resident of the Town of Gaston, Northampton County, State of North Carolina; a copy of said decree being attached hereto and made a part hereof, marked Exhibit A. That at the time of rendition of said decree the New York Court had jurisdiction of both parties to the action, and of the child who was then domiciled in and a resident of the State of New York.

4. That thereafter said child was taken to the home [fol. 3] of the defendant, George A. Brewer, Sr., and has resided and now resides in said home situate in Northampton County, State of North Carolina, in the custody and control of the defendant; and that said child was originally taken out of the State of New York pursuant to order of its said court.

5. That on October 2, 1951, and again on November 17, 1952, this petitioner made application in the Supreme Court of the State of New York in and for the County of New York for modification of said divorce decree to award custody of said child to this petitioner. That both

of said applications were denied, for the reason that the said Court could find no sufficient evidence of any change in circumstances since date of the original decree to justify changing its custody award therein made.

6. That in July 1954, this petitioner married Joseph Kovacs, and now lives with him in Riversdale (sic), New York; and that no children have been born of this marriage.

7. That after her remarriage, this petitioner once more, on November 9, 1954, applied to the aforesaid New York Court for a modification of the divorce decree to award custody of the child to her. That on December 23rd 1954 this application was granted by order awarding custody of the child, Jane Elizabeth Brewer, to this petitioner. That the defendant herein, George A. Brewer, Sr., and his son, George A. Brewer, Jr., former spouse of this petitioner, and father of the child, appeared in the proceeding by counsel; submitted to jurisdiction of the said New York Court on the question of custody therein raised, and submitted affidavits in opposition to the granting of the order. A copy of said order is attached hereto and made a part hereof, marked Exhibit B.

8. That despite the entry of said order by said New [fol. 4] York Court which had carefully scrutinized the relevant circumstances of the case with a view to acting in the best interest of said child, having twice previously denied similar applications as hereinbefore set out because of a failure to find changed circumstances warranting modification; and despite the fact that the defendant, George A. Brewer, Sr. was a party to said proceeding and had sufficient legal notice of all orders therein entered, the said defendant has wilfully and wrongfully refused and now refuses to relinquish custody and control of said child to this petitioner as directed by order of said New York Court, and is therefore in contempt of said New York Court.

9. That this petitioner is informed and believes and therefore alleges that the decree of the New York Court dated December 23, 1954, is entitled to full faith and credit in the courts of North Carolina except as to matters show-

ing changed circumstances since the date of such decree. And petitioner expressly pleads said New York decree as entitling her to custody of said child by judgment of this Court, in the absence of a showing by defendant of such changed circumstances.

10. That the present custody and control of said child by the defendant, George A. Brewer, Sr., is under the following circumstances:

(a) The grandfather custodian is a man of advanced years, a diabetic, and the subject of at least one heart attack. As will be shown by the divorce decree made a part hereof, custody was originally awarded the defendant herein on the supposition that the father, George A. Brewer, Jr., then in the Navy, would soon be out and could assume custody directly, but as this petitioner is informed and believes, and so avers, the fact is that he is still in the Navy, some five years [fol. 5] later, and intends to make it his career. Under these circumstances, petitioner avers that it is inevitable that a disruption of the present physical custody by the defendant is to be expected before too long, with all of the attendant emotional upheaval for the child caused thereby.

(b) The physical surroundings of the child's residence are confined and inconvenient and may be expected to become even more so as the young girl advances in years. The defendant's house where the child now lives is a frame four-room dwelling in the Town of Gaston with no central heating. The house is approximately 24 feet by 17 feet in over-all size, exclusive of porches, containing a bedroom of about 7 feet by 12 feet, where the child sleeps with Mrs. Brewer, Sr., in a single three-quarter bed, a living room of about 10 feet by 12 feet where Mr. Brewer, Sr., sleeps, a dining room of about 7 feet by 12 feet, a bathroom and a kitchen of about 5 feet square size each. There the child lives with two elderly persons and, as petitioner is informed and believes, a boy of about seventeen. Petitioner avers that however com-

mendable the defendant Geo. A. Brewer, Sr. may be as a man, the physical surroundings which he can provide are not conducive to the welfare and best interest of a young girl of around ten years.

(c) Petitioner does not have sufficient information on which to form a belief and base any allegation pertaining to the degree of continuing affection and care bestowed upon her child by the defendant and his second wife, but can aver that it could not, in the very nature of the case, be as deep as that of a mother. Petitioner, under her visitorial rights granted in the original decree, has visited the child as frequently as her economic condition would allow. These visits have been fraught with difficulty as respects transportation [fol. 6] and as respects the opportunity really to visit her child privately. She has sensed a steady alienation of the child's affection from her and avers that such is unnatural and can be expected to continue under present circumstances; and that the child is being deprived of the mother-child relationship which cannot be duplicated by any other.

11. Petitioner has the deep and abiding affection for her child which is natural, and desires above all things to have the opportunity to raise her child in her home. Petitioner has not always in the past been in a position to offer the child the surroundings and opportunities which she would wish, but she now is in such a position and represents to the court the following matters respecting the conditions under which she could now assume custody of the child:

(a) Petitioner is now married to Joseph Kovacs and they reside in a modern four and one-half room apartment in Riverdale, New York. This apartment is well situated and petitioner has a separate room prepared for the child if custody is awarded her. The apartment has a playground which adjoins the building and is a short block away from a modern school which the child would attend. Petitioners will exhibit to the court at hearing photographs of the apartment building, the

apartment itself, the playground and the school above referred to.

(b) Petitioner's present husband desires very strongly that the child's custody be awarded to petitioner. He is entirely responsible financially, being engaged in a profitable used car business in New York City at the foot of West 125th Street, and is willing to contribute of his means for the care of the said child should custody be awarded petitioner.

[fol. 7] 12. That, based upon a comparison of the facilities offered by the defendant and by this petitioner, and upon consideration of the special relationship of motherhood which petitioner bears to the child, your petitioner verily believes and so avers that the child's best interest will be served and her welfare best furthered by having her custody awarded to this petitioner so that she may be raised in wholesome convenient surroundings and under a mother's love and care.

Wherefore, your petitioner prays the Court that, pursuant to the provisions of Section 50-13 of the General Statutes, it require and compel defendant to surrender custody of the child to your petitioner; and that it award full custody of said child to your petitioner with such reasonable visitorial privileges as to the court may seem proper; and that it make such other orders and conditions respecting the custody of said child as to the court may seem proper.

Sanford, Phillips & Weaver, By: Dickson Phillips,
Attorneys for Petitioner.

(Verified by Ada S. Kovacs, Feb. 20, 1956.)

EXHIBIT A TO PETITION

At a Special Term, Part IV of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse, Foley Square, in the City, County and State of New York, on the 17th day of January 1951.

PRESENT:

HON. CARROLL G. WALTER,

Justice.

FILE NO. 15950—1950

[fol. 8]

GEORGE A. BREWER, JR., Plaintiff

v.

AIDA S. BREWER, Defendant

INTERLOCUTORY JUDGMENT OF DIVORCE

This action having been regularly brought to trial before the Hon. CARROLL G. WALTER, sitting without a jury at a Special Term, Part IV of this Court, held on the 10th and 11th days of January 1951, at the Courthouse, Foley Square, in the County of New York, and the plaintiff having appeared by his attorneys, Messrs. MERCHANT, OLENA, BUCK & SANTOMENNA, by ALFRED E. BUCK, ESQ., of counsel, and the defendant by her attorney, IRVING J. KAUFMAN, ESQ., and the Court having heard the allegations and proofs of the parties, and after due deliberation having duly made its decision directing judgment as hereinafter provided:

NOW, on motion of MERCHANT, OLENA, BUCK & SANTOMENNA, attorneys for the plaintiff, it is hereby

ORDERED, ADJUDGED AND DECREED, that the plaintiff, GEORGE A. BREWER, JR., is entitled to a judgment against the defendant, AIDA S. BREWER, dissolving the marriage relation heretofore existing between the parties hereto because of the adultery of the defendant as prayed for in the complaint; and it is further

ORDERED, ADJUDGED AND DECREED, that the counterclaim in defendant's answer herein be and the same hereby is dismissed on the merits; and it is further

ORDERED, ADJUDGED AND DECREED, that this judgment is interlocutory only, but shall become the final judgment as of course three months after the entry and filing hereto unless for sufficient cause the court shall, in the meantime,

[fol. 9] have otherwise ordered. Upon this judgment becoming the final judgment, the marriage relation heretofore existing between GEORGE A. BREWER, JR., plaintiff, and AIDA S. BREWER, defendant, shall be dissolved; and it is further

ORDERED, ADJUDGED AND DECREED, that sole custody of the infant issue of the marriage relation heretofore existing between the parties hereto, viz: JANE ELIZABETH BREWER, aged four (4) years, be and the same hereby is awarded to GEORGE A. BREWER, paternal grandfather of JANE ELIZABETH BREWER, said infant herein, until the said GEORGE A. BREWER, JR., plaintiff herein, is discharged from the Navy, at which time and on which event sole custody of the said JANE ELIZABETH BREWER, infant issue of the marriage relation heretofore existing between the parties hereto, may be assumed by GEORGE A. BREWER, JR., plaintiff herein.

ENTER

(s) C. G. W.
J.S.C.

Verified by County Clerk
April 17, 1951.

EXHIBIT B TO PETITION

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House, Foley Square, Borough of Manhattan, City of New York, on the 31st day of December 1954.

PRESENT:

HON. EUGENE L. BRISACH,
Justice.

GEORGE A. BREWER, JR., Plaintiff
v.
AIDA S. BREWER, Defendant

[fol. 10] A motion having been made herein by Order to Show Cause dated November 9, 1954, requiring the plaintiff to show cause, why an order should not be made and entered herein modifying and amending the final decree of divorce herein to grant to the defendant, Aida S. Kovacs (formerly Aida S. Brewer) the custody of the child of the marriage between plaintiff and defendant, and granting to said defendant such other and further relief as to the court may seem just and proper, and said Order to Show Cause having regularly come on to be heard at a Special Term, Part I, of this Court on the 19th day of November 1954,

Now, on reading and filing the said Order to Show Cause, dated November 9, 1954, the affidavit of Aida S. Kovacs, verified November 9, 1954, Joseph Kovacs, verified November 8, 1954, Joseph L. Morse, verified November 8, 1954, Paul Benson, verified November 5, 1954, Hyman Speisman, verified November 8, 1954, and Louis Haimoff, verified November 9, 1954, the reply affidavits of Aida S. Kovacs, verified December 20, 1954, and Joseph Kovacs, verified December 20, 1954, and the judgment of divorce heretofore entered herein dated January 17, 1951, submitted in support of said Order to Show cause, and the affidavits of George A. Brewer, Jr., George A. Brewer, Rev. A. E. Brown, Blair T. Gibson, Lillian Reid, Raz Autry, Dr. F. G. Kroncke, John C. Gay, W. H. Pruden, Eric Norfleet, all verified on December 15, 1954, the affidavit of Alfred E. Buck, verified December 16, 1954, and the affidavit in rebuttal of Alfred E. Buck, verified December 21, 1954, submitted in opposition thereto, and upon all of the pleadings and proceedings heretofore had herein, and after hearing Louis Haimoff, Esq., in support of said Order to Show Cause, and Merchant, Olena, Buck and Santomenna, Esqs., by Alfred E. Buck, of counsel, in opposition thereto, and due deliberation having been had, [fol. 11] and the court having rendered and filed its written opinion herein, dated the 23rd day of December 1954.

Now, on filing the opinion of this court and upon motion of the attorney for the defendant herein, it is

ORDERED that the motion of the defendant be and the same hereby is granted; and it is further

ORDERED that the judgment of divorce heretofore entered herein be and the same hereby is modified to provide that the custody of the child of the parties be awarded to the defendant; and it is further

ORDERED that said child of the parties shall be delivered to the defendant at her residence at 5620 Netherland Avenue, Bronx, New York, within ten days of the date of the service of a copy of this order, with notice of entry, or at the election of the defendant, the child shall be delivered to defendant or her representative at Gaston, N. C., said service to be made upon the attorneys for the plaintiff at the office of said attorneys, and a copy of said order to be served by registered mail addressed to George A. Brewer, Sr., Town of Gaston, North Carolina, which shall be mailed to said George A. Brewer, Sr., within two days after the entry of this order; and it is further

ORDERED that the plaintiff be permitted and allowed to visit the child at the place of residence of the defendant, but for no more than a period of three hours on the occasion of any one visit, provided, however, that plaintiff shall give the defendant two days prior written notice of his intention to exercise such right of visitation.

ENTER,

ELB
J.S.C.

[fol. 12] IN SUPERIOR COURT OF NORTHAMPTON COUNTY

ANSWER

The defendant, answering the petition, says:

1. The allegations made in section 1 of the petition are true and admitted.

2. The allegations made in section 2 of the petition are true and admitted.

3. The allegations made in section 3 of the petition are true and admitted.

4. The allegations made in section 4 of the petition are true and admitted.

5. The allegations made in section 5 of the petition are true and admitted.

6. The defendant does not have sufficient information to form a belief as to the allegations made in section 6 of the petition and the same are denied.

7. The allegations made in section 7 of the petition are true and admitted, except that it is denied that the defendant, George A. Brewer, Sr., and his son, George A. Brewer, Jr., submitted to the jurisdiction of the New York Court.

8. The allegations made in section 8 of the petition are untrue and denied.

9. The allegations made in section 9 of the petition are untrue and denied.

10. The allegations made in section 10, subsections (a), (b) and (c) are untrue and the same are denied except as the same may be hereinafter admitted in the further answer.

11. The defendant does not have sufficient information to form a belief as to allegations made in section 11, sub-
[fol. 13] sections (a) and (b), and the same are denied.

12. The allegations made in section 12 of the complaint are untrue and denied.

And the defendant, FURTHER ANSWERING the petition, alleges and says:

1. That on January 17, 1951, George A. Brewer, Jr. obtained a divorce from his wife, Aida S. Kovacs, in the Supreme Court of the State of New York in and for the County of New York, upon the grounds of adultery and that Joseph Kovacs, who is now alleged to be the husband of the petitioner, was named as co-respondent in said action.

2. That in the judgment entered in said divorce action the custody of the child of the marriage, Jane Elizabeth

Brewer, was awarded to George A. Brewer, Sr., the paternal grandfather of the child, but that Aida S. Kovacs having the child in her possession went into hiding and several months passed before she could be found and compelled to deliver the child to George A. Brewer, Sr.

3. That after delay for the reasona (sic) hereinbefore alleged, George A. Brewer, Sr., obtained custody of the child in 1951 and since that time he has had the custody of the child and the child has lived continuously with him in the Town of Gaston, Northampton County, North Carolina.

4. That the child was not physically present in New York in December 1954 when the New York Court entered an order attempting to award custody of the child to the petitioner.

5. That since the divorce was obtained as hereinbefore alleged, George A. Brewer, Jr. has been a resident of and domiciled in the State of North Carolina.

[fol. 14] 6. That the child of the marriage has lived with George A. Brewer, Sr. and his wife, who are of good reputation and standing and fit and suitable persons to have her custody, for more than five years during which they have loved and cared for her and given her all the advantages of a good Christian home and of being raised in a country environment, and that as a result the child has become deeply attached to them and also to her friends in Church and school. At the time the child came to live with them she was only five years of age and she is still of an impressionable age and that to transfer her from the custody of the defendant to the custody of the petitioner at this time would be a complete disruption of her life. That the defendant and his wife desire that the child continue to live with them and are ready to and will look after and properly care for and train her. That the father of the child is a Machinist's Mate, first class, in the United States Navy, who contributes $157.50 per month for the support of the child and that he wants the child to remain in the custody of the defendant. That the best interests of the child will be

served by allowing her to remain in the custody of the defendant.

7. The petitioner is not a fit and suitable person to have custody of the child.

WHEREFORE, the defendant prays that the petition be denied and that the custody of the child, Jane Elizabeth Brewer, be awarded to him; that the cost of the proceeding be taxed upon the petitioner, and for such other and further relief to which he may be entitled.

GAY & MIDYETTE
ERIC NORFLEET
Attorneys for Defendant.

Verified by George A. Brewer, Sr.,
March 29, 1956.

[fol. 15] IN SUPERIOR COURT OF NORTHAMPTON COUNTY

JUDGMENT OF STEVENS, J.—December 10, 1956

By Agreement of counsel for petitioner and respondent, this cause came on to be heard and was heard on September 12, 1956 at Winton, North Carolina, before Honorable Henry L. Stevens, Jr., Judge, regularly assigned and holding courts of the Sixth Judicial District, at which time and place the petitioner was present in person and represented by counsel, and the respondent was present in person and represented by counsel. The minor who is the subject of this controversy was also present, as was her father, George A. Brewer, Jr.

By direction of the court, the matter was heard solely on affidavits, the pleadings, certain stipulations, and petitioner's Exhibits Nos. 1 and 2, and upon consideration thereof the court finds as facts:

1. That George A. Brewer, Jr., father of Jane Elizabeth Brewer, the minor child who is the subject of this controversy, enlisted in the U. S. Navy in 1946 and has been a member of such service since that date.

2. That on April 18, 1945, the said George A. Brewer, Jr. married Aida Speciale (now Aida Kovacs). On May

30, 1946, a child, Jane Elizabeth Brewer, was born to said marriage. That they lived together in the marital relation until sometime in 1950. That on July 31, 1950, George A. Brewer, Jr. instituted an action for divorce against his wife on the grounds of adultery in the Supreme Court of the State of New York in and for the County of New York. That on January 17, 1951, said Court entered a decree of divorce in favor of George A. Brewer, Jr. against his said wife on the grounds of adultery with Joseph Kovacs, and awarded the custody of the child, Jane Elizabeth Brewer, to George A. Brewer, Sr., the father of George A. Brewer, Jr., and the grandfather of said child.

[fol. 16] 3. That immediately after the rendition of the decree awarding custody of said child, the said Aida Brewer went into hiding, taking the child with her, and it was not until on or about September 6, 1951 that the said father or grandfather were able to find the child and her mother. They were found living with Joseph Kovacs at 21 James Avenue in Jersey City and in order to gain the physical custody of the said child, it was necessary for the parent and grandparent to obtain a writ of habeas corpus in the Superior Court Chancery Division of Jersey City. Upon a hearing on the return of said writ, physical possession and custody of said minor was granted to the father and grandfather of said child.

4. That immediately thereafter, the said grandfather returned to his home in Gaston, Northampton County, North Carolina, bringing with him the said Jane Elizabeth Brewer. The domicile of the said George A. Brewer, Sr. is now and has been for more than twenty years, said Town of Gaston, Northampton County, North Carolina.

5. That since said time the said Jane Elizabeth Brewer has been continuously residing in the home of her grandfather, George A. Brewer, Sr., in Gaston, Northampton County, North Carolina, and at no time has been out of the State of North Carolina.

6. That immediately following the divorce decree on January 17, 1951, George A. Brewer, Jr. left the State of New York with the intention not to return, and has con-

tinuously resided since then in Gaston, North Carolina except for the times that he was on duty in the Navy; has voted in elections held in Gaston Precinct in 1952, 1954 and 1956; that since said time, and in the periods when he owned an automobile, such car has been registered in North Carolina with a North Carolina license plate and the same in the Town of Gaston; that since he left New York, he [fol. 17] has paid his federal income tax through the Greensboro, North Carolina office; that since he left New York, he has spent his leaves at his home in Gaston, North Carolina with his father, stepmother and child. That at all times since he left the State of New York, and now, George A. Brewer, Jr. has been and is a resident of and domiciled in Gaston, North Carolina.

7. That George A. Brewer, Jr. is a Machinist Mate First Class in the U. S. Navy with a base pay of $258.00 per month, plus $77.10 for the maintenance of Jane Elizabeth Brewer. That he makes an allotment and pays monthly to his father the sum of $157.10 for the support and maintenance of Jane Elizabeth Brewer.

8. That on October 2, 1951, and again on November 17, 1952, the petitioner made application in the Supreme Court of the State of New York for the modification of said divorce decree seeking custody of said child for the petitioner. Both applications were denied. That in July 1954, the petitioner married Joseph Kovacs, the person who was named as co-respondent in the divorce action hereinabove referred to, and the person whom the court found was the co-respondent. That in November 1954, the petitioner again applied to said New York Court for a modification of the divorce decree seeking custody of the child for herself. That upon a hearing upon said petition, the court entered a decree awarding such custody. At said hearing, neither George A. Brewer, Sr. nor George A. Brewer, Jr. appeared in person but did through counsel and each submitted affidavits which were considered by the court. The minor child, Jane Elizabeth Brewer, was not present in the State of New York at the time of said hearing, or at any time since her removal from said State in 1951. At the time of said hearing, and since 1951, she has been a resident of and domi-

ciled in Gaston, North Carolina. That neither George A. [fol. 18] Brewer, Sr. nor George A. Brewer, Jr. has been in the State of New York since 1951.

9. That petitioner filed her petition in the present case in the Superior Court of Northampton County on the 24th day of February 1956, under the provisions of Section 50-13 of the General Statutes of North Carolina; summons was personally served on the defendant on February 29, 1956; the defendant filed answer on March 29, 1956.

10. That George A. Brewer, Sr. is 64 years of age and for more than one year has not required any care for a coronary artery condition or for a diabetic condition. He is able to work, and properly supervise the maintenance and care for his granddaughter, Jane Elizabeth Brewer; that he is Senior Trustee of the Board of Stewards, Teacher of the Adult Bible Class of his Church School and an active and reliable layman of his church. He is vitally interested in the public schools of his community and in consequence of such church and school interest and activity the environment of his home is suitable for the upbringing of a child; that George A. Brewer, Sr. owns his residence. It is situated in the corporate limits of the Town of Gaston and located tastefully on a hill, is small, but adequate and neat. The home is attractive in appearance, comfortable and modest. It is complete with bath, hot and cold water, is heated with an oil heater floor furace (sic) and has a gas heater in the fireplace which may be used as auxiliary heat in case of severe weather.

That Mrs. George A. Brewer, Sr. is a graduate Nurse of the Roanoke Rapids, N. C. Hospital, having graduated in 1927; that she is peculiarly qualified to give attention and care to said minor, Jane Elizabeth Brewer; that she has shown, and continues to show, affection and interest in said minor; that she is a teacher of small children in her Church School. She is a gentle, loving person, fully [fol. 19] qualified in every way to give Jane Elizabeth Brewer motherly care and christian nurture and training that she needs at this period of her life.

11. That Jane Elizabeth Brewer was about 5½ years of age when her custody was awarded to her grandfather,

George A. Brewer, Sr.; that she has lived continuously since said time with her grandfather and step-grandmother; that she has been a constant attendant at church services and at church school. In church school she has been awarded a pin for uninterrupted attendance for a period of more than five years; that she has been a constant attendant in the local elementary school where she has proven to be a bright and attractive child. She has done well in her scholastic work and has been one of the top-ranking pupils. In 1954, she voluntarily made a public confession of Christ and joined the church of her grandparents of her own free will.

Said minor is provided with a swing, toys, dolls and doll house and a playhouse. She has many young friends with whom she plays and visits. She has made and enjoys friends in the Town of Gaston not only among those of her age, but with adults also. Her health is good and she has had the doctor only twice since 1951, and that was for a minor upset stomach which lasted only a day. She has grown several inches in height and has gained in weight.

She has advantages equal to those of any child in Gaston, good schools, supervised playground, recreational facilities, a good home and church training, and above all a sense of being loved and wanted.

12. That in 1954, when the said New York decree was entered, there was residing in the home of George A. Brewer, Sr., himself, his wife and the son of Mrs. Brewer; [fol. 20] that the son of Mrs. Brewer is no longer residing in said home, and it is now occupied only by Mr. and Mrs. George A. Brewer, Sr. and the said Jane Elizabeth Brewer. That the removal of the son of Mrs. George A. Brewer, Sr. provides more space in the home for the convenience and comfort of said child, and lessens the responsibility of the said Mr. and Mrs. George A. Brewer, Sr. in providing maintenance and supervision for said minor.

13. That the petitioner, Aida Kovacs, is not a fit and proper person to have the care, custody and control of the minor, Jane Elizabeth Brewer.

14. That George A. Brewer, Sr. is a man of excellent character, good habits and conduct, and is a fit and suit-

able person to have the care, custody and control of the minor, Jane Elizabeth Brewer.

15. That the welfare, interest and development of the child will be materially promoted by allowing her to remain in the custody of George A. Brewer, Sr. and in the environment to which she has become accustomed and upon which in a measure she depends.

Hereupon, it is Adjudged and Decreed:

1. That this Court, in passing upon the care, custody and control of Jane Elizabeth Brewer, is not bound by or required to give effect to the decree of the Court of the State of New York made in 1954 and hereinbefore referred to.

2. That the petitioner's petition to be awarded the care, custody and control of the said Jane Elizabeth Brewer is hereby denied.

3. That the care, custody and control of the said Jane Elizabeth Brewer is hereby awarded to the respondent, George A. Brewer, Sr.

[fol. 21] 4. That the petitioner is hereby given the right and privilege of visiting the said Jane Elizabeth Brewer in the home of the respondent not more frequently than once a month, such visits to be made at reasonable hours, and after giving the respondent at least two days notice, in writing, and of taking the said Jane Elizabeth Brewer on trips or for rides outside the home of the respondent, but within the State of North Carolina; but the respondent may impose any or all of the following restrictions upon said rights and privileges:

(a) That upon said visits the petitioner shall be unaccompanied, and

(b) That said visits be made in the presence of respondent or a representative to be selected by the respondent, and

(c) That the automobile in which Jane Elizabeth Brewer is taken for a ride be driven by a law enforcement officer of Northampton County, North Carolina,

or of the City of Gaston, North Carolina to be selected by the respondent.

(d) This cause is retained and held open for further motions, proceedings and orders.

By consent of counsel, the signing of this judgment is done at Halifax County in the Sixth Judicial District on the 10th day of December 1956.

Henry L. Stevens, Jr., Judge Regularly Assigned and Holding Courts of the Sixth Judicial District.

IN SUPERIOR COURT OF NORTHAMPTON COUNTY

APPEAL ENTRIES

The petitioner, Aida S. Kovacs, in apt time, excepts to each of the court's findings of fact numbered consecutively [fol. 22] from 1 through 15; to the conclusion of law numbered 1, stating "that this court, in passing upon the care, custody and control of Jane Elizabeth Brewer, is not bound by nor required to give effect to the decree of the court of the State of New York made in 1954 and hereinbefore referred to;" and to the signing of the judgment. Petitioner in open court gives notice of appeal to the Supreme Court of North Carolina. Further notice waived. Appeal bond set in the amount of $150.00.

By consent petitioner appellant given 45 days to prepare and serve case on appeal, and defendant appellee given ten days thereafter to serve countercase or file exceptions.

This 10th day of December 1956.

Henry L. Stevens, Jr., Judge, etc.

IN SUPERIOR COURT OF NORTHAMPTON COUNTY

CASE ON APPEAL

This was a special proceeding commenced in Northampton County in the Sixth District under the provisions of

Section 50-13 of the General Statutes, to have adjudicated the right to custody of a minor child, Jane Elizabeth Brewer, as between petitioner and defendant. By agreement of counsel, the matter was heard before Henry L. Stevens, Jr., Judge presiding over the courts of the Sixth District, at Winton, North Carolina, in said District on September 12, 1956; and by further agreement, judgment was entered by Judge Stevens in Halifax, North Carolina, in said District on December 10, 1956. From judgment in favor of defendant, petitioner appealed.

IN SUPERIOR COURT OF NORTHAMPTON COUNTY

STIPULATION OF COUNSEL AS TO RECORD AND CASE ON APPEAL

It is Stipulated and Agreed by petitioner and defendant [fol. 23] through their respective counsel of record that this matter was heard and adjudicated entirely upon a consideration of the duly verified pleadings with admissions therein contained; five (5) certain stipulations of fact entered into by the parties through their respective counsel of record; two (2) certain Exhibits of petitioner identified as Nos. 1 and 2; and nineteen (19) certain affidavits adduced in evidence by defendant; that these constituted the sole evidence before the court, there having been no oral testimony adduced; that the record proper and the items above enumerated are set forth fully herein and as such shall constitute the record and case on appeal.

IN SUPERIOR COURT OF NORTHAMPTON COUNTY

Statement of Evidence

Petitioner's Evidence

Petitioner offered in evidence the allegations contained in paragraphs 1 through 7 inclusive of the duly verified petition herein filed, with attached Exhibits A and B therein referred to, and the admissions corresponding thereto

as contained in paragraphs 1 through 7 inclusive of the duly verified answer herein filed.

Petitioner offered in evidence the following stipulations of fact entered into by the parties through their respective counsel of record:

Stipulations of Fact:

(1) That all affidavits in Petitioner's Ex. 1 were introduced in evidence in the proceedings in the Supreme Court of N. Y. for N. Y. County culminating in the decree of Dec. 23, 1954, which was the modification of the original order awarding custody of Jane Elizabeth Brewer.

[fol. 24] (2) That Geo. A. Brewer, Jr., is now, Sept. 12, 1956, a member of the U. S. Navy.

(3) That George A. Brewer, Sr., the present custodian of Jane Elizabeth Brewer, refused to deliver the child to its mother, Aida S. Kovacs, as directed by the N. Y. decree.

(4) That Jane Elizabeth Brewer, the child, was not physically present in court before the Judge in the State of N. Y. when the decree was modified to award the custody of said child to Aida S. Kovacs, nor did Geo. A. Brewer, Sr., or Geo. A. Brewer, Jr., appear in person at said hearing but did appear by counsel, and that Jane Elizabeth Brewer from the Fall of 1951 to this date, Sept. 12, 1956, had been continuously residing in the State of North Carolina in the town of Gaston, in Northampton County in the custody of her paternal grandfather Geo. A. Brewer, Sr.

(5) It is stipulated that a paper writing dated December 23, 1954, marked Ex. 2 of petitioner, is the opinion of Brisach, J., in the matter of the modification of the order awarding custody of Jane Elizabeth Brewer.

Petitioner offered in evidence as her Exhibit No. 1, a series of affidavits referred to in Stipulation of Fact (1) above:

EXHIBIT No. 1

SUPREME COURT, NEW YORK COUNTY

GEORGE A. BREWER, JR.	)	FILE No. 15950—1950
against	)	PLAINTIFF'S OPPOSING
AIDA S. BREWER	)	AFFIDAVIT

STATE OF NORTH CAROLINA
COUNTY OF NORTHAMPTON:

[fol. 25] GEORGE A. BREWER, JR., being duly sworn, deposes and says:

1. I am the plaintiff in the above-entitled action and father of JANE BREWER, my daughter, 8 years of age, whose custody was awarded to my father, GEORGE A. BREWER, of Gaston, North Carolina while I am serving in the United States Navy.

2. I make this affidavit in answer to that of the defendant who is trying once more to change the custody provision which Judge Walter gave me after the trial of this divorce action in New York County Supreme Court by judgment entered January 17, 1951.

3. The defendant was proved guilty of adultery with one JOSEPH KOVACS during 1950. Since I recovered my divorce judgment against the defendant and custody of my daughter, the defendant has continuously shown a record of such contumacious conduct that this court should be convinced once and for all that Judge Walter was right in giving my father custody of my daughter while I am in the Navy.

THE FACTS ARE:

A. The defendant appealed from Judge Walter's decision and the appeal was dismissed for failure to prosecute.

B. Sometime between January 17, 1951, the date of the divorce decree, and April 24, 1951, the date of Justice Benvenga's decision in New York County on the plaintiff's habeas corpus proceeding, the defendant disappeared with my daughter and Judge Benvenga stated in his decision—

"That the defendant Brewer is guilty of contempt is clear." Judge Benvenga went on to say in his decision—"That she may be guilty of kidnapping and that the other defendants may be accessories to the kidnapping is quite likely." This [fol. 26] decision is in the file of this Court under Index No. 6022-1951 and was the outcome of my effort in New York to obtain physical possession and custody of my daughter, Jane. Subsequent to April 24, 1951 and upon investigation and with the aid of the police departments of the City of New York and Jersey City, I was able to locate my daughter living with the defendant and the co-respondent in the divorce action, the same JOSEPH KOVACS, at 21 James Avenue, Jersey City, New Jersey.

C. On September 6, 1951, accompanied by my father, and with a certified copy of my divorce decree containing the custody provision in my possession, at about 8 p. m. I again located my daughter with the defendant and the same JOSEPH KOVACS in front of said premises, 21 James Avenue, Jersey City, and the police department of Jersey City took Jane in temporary custody and she stayed that night at the Jersey City Medical Center. The next morning, September 7th 1951, I obtained a writ of habeas corpus in Superior Court, Chancery Division, Jersey City, under Index No. M-192-1951, against the defendant which was heard that same afternoon, following which immediate physical possession and custody of Jane was granted to me and the Jersey City Medical Center was directed by the order of that Court to turn her over to me and to my father. Ever since that date she has lived in my home in Gaston, North Carolina. The defendant had no right, and in fact contemptuously and contrary to law, removed my daughter from New York and secreted her where she thought I could not locate her. The defendant now asking the aid of this court is the same defendant who told me in Jersey City that "I don't care what the New York Court said, I'll take Jane anytime I want."

D. Just three days later, on September 10, 1951, the de-[fol. 27] fendant in New York County Supreme Court started a new series of efforts to change the custody provision and alleged in her papers that she was making $60

to $70 per week and had joined Emory Methodist Church in Jersey City and tried to convince the court that her home, at 21 James Avenue, Jersey City, was a suitable one for Jane to be sent back to by this Court. This location was in the very center of three of the heaviest traffic arteries in the metropolitan area, having on one side the Jersey City Vehicular Thruway and just above it the Pulaski Skyway and on the other side the access to the downtown industrial area of Jersey City. On October 2, 1951 Mr. Justice Gavagan denied her application.

E. On July 24, 1952 the defendant again came before this court by order to show cause renewing once more her application to obtain custody of my daughter. By this time the defendant had moved to 36 Prospect Street, Jersey City and maintained that her apartment there was a suitable location for her to bring Jane if custody were awarded to her. The defendant reiterated her membership in Emory Methodist Church and her intentions of giving Jane proper training in the Sunday School and religious guidance, yet by actual test 36 Prospect Street is located over two miles from that church. This motion was referred by Mr. Justice Aurielo to Mr. Justice Walter who, on November 17, 1952, denied the defendant's motion and continued custody with my father exactly as in the original divorce decree.

F. The defendant now for the third time comes before this court with the same motion and with pictures of an apartment in Riverdale and says she has remarried and her new husband has an income of $150 per week and is a fine man. Yet what are the facts? Let us look at the record: [fol. 28] Prior to her remarriage the defendant failed to obtain the order of this court in the divorce action for leave to remarry upon a showing of good conduct. I have instructed my attorneys to requisition the record of my divorce action for this court to take notice of this further contempt on the part of the defendant of the laws of this State. Instead of obtaining such an order, the defendant remarried in Jersey City on July 9, 1954 without disclosing in her application of July 6, 1954 that she was incapable of re-marrying, and she merely referred to the New York

divorce of January 17, 1951, thus implying that it was she who divorced her husband. As proof of this point I have obtained a certified copy of the defendant's marriage license application and of the marriage record as aforesaid and the same is inserted at this point:

Form 9 V. S. (53)

NEW JERSEY STATE DEPARTMENT OF HEALTH

DIVISION OF VITAL STATISTICS AND ADMINISTRATION.

DECLARATION OF MALE APPLICANT FOR A MARRIAGE LICENSE.

NOTE TO REGISTRAR— Applicants should be told that they are to be sworn and that taking a false oath constitutes perjury which is punishable by law.

1. What is your full name? JOSEPH KOVACS.

2. What is your age (see Note 1)— 36.
Date of Birth— Aug. 1, 1917.

3. Where do you live? 5620 Netherland Ave (Street Address), Riverdale (City, borough, township), Bronx (County), N. Y. (State).

[fol. 29] 4. Are you related to the intended bride? No. If so, how? ——

5. Are you an epileptic, or of unsound mind, or an inmate of or on parole from any institution for the insane or indigent? No.

6. Are you infected with gonorrhea or chancroid in a communicable stage? (See Note 2) No.

7a. Have you ever been married? Yes. If so, are you now legally free to marry again? Divorced (Note 4 outlines procedure for issuing remarriage licenses).

7b. If divorced, when and where were you divorced? July 6, 1954 Ann Kovacs Supreme Court, N. Y. County, N. Y. S. Gold, Justice.

7c. If widowed, when and where did your wife die? ——

DECLARATION OF FEMALE APPLICANT FOR A MARRIAGE LICENSE:

1. What is your full name? Aida Speciale Brewer.

2. What is your age? (See Note 1)—38.
Date of birth? April 3, 1916.

3. Where do you live? (See Note 3)? (Street address): 36 Prospect St. (City, borough, township): Jersey City. (County): Hudson. (State): N. J.

4. How long have you lived there? 3 yrs.

5. Are you related to the intended groom? No. If so, how? ——

6. Are you an epileptic, or of unsound mind, or an inmate of or on parole from any institution for the insane or indigent? No.

[fol. 30] 7. Are you infected with gonorrhea or chancroid in a communicable stage? (See Note 2) No.

8a. Have you ever been married? Yes. If so, are you now legally free (Note 4 outlines procedure for issuing remarriage license) to marry again? Divorced.

8b. If divorced, when and where were you divorced? April 17, 1951—George Brewer, Jr. Supreme Court, N. Y. County, N. Y.—C. Walter, Justice.

8c. If widowed, when and where did your husband die? ——

9. Where and by whom do you intend being married? Judge Galvin.

10. Date of marriage? July 9.

NOTE 1— Written consent of both parents is required for the marriage of any male under twenty-one years of age and any female under eighteen. In addition, if the male is under eighteen or the female under sixteen, the consent of the parents must be approved in writing by a judge of the county court or a judge of the juvenile and domestic relations court of the county. Any such applicant should be instructed to have the certificate of consent (Form 10 V. S.)

properly completed and then presented to a judge for written approval. Consent of parents is required for the remarriage of a minor previously married to the same mate in another State.

NOTE 2— Laboratory blood test for syphilis must be made not more than thirty days before the issuance of marriage license. Certificates to be attached to license. Not necessary that they be present when application for license is made.

[fol. 31] NOTE 3— Question 3 refers to "usual place of abode," the permanent home and principal establishment to which, when absent, she has the intention of returning. Any very recent change of address may be an effort to defeat the purpose of the marriage license act.

NOTE 4— When a remarriage license is requested, adjust Item 7 for the male applicant and 8 for the female to show that the parties are already married. It is required that proof of the previous marriage be submitted to you. Common law marriages which were legal prior to Dec. 1, 1939, must be established by affidavit showing the place and date of the common law marriage contract. The place and date of the previous marriage should be stated on both the application and the license. On the license it should be supplied below the date of issue and to the left of your signature and P. O. address. It is also suggested that the letters "RE" be placed to the left of the word "marriage" at the top of the marriage license form. The seventy-two hour waiting period and blood test requirement are waived in remarriage cases. Consent of parents is required for the remarriage of a minor previously married to the same mate in another State.

DECLARATION OF IDENTIFYING WITNESS:

NOTE TO REGISTRAR— Witness should be told that taking a false oath constitutes perjury, which is punishable by law. Both male and female witnesses must be of legal age, which is twenty-one years.

1. What is your full name? DOMENICA SPECIALE

2. Where do you live? 36 Prospect Street, Jersey City.

3. How long have you known each applicant? Male, 4 years. Female—daughter.

[fol. 32] 4. Have the applicants correctly stated their usual residences? Yes.

5. Do you know of any legal impediment to their marriage? No.

OATH OR AFFIRMATION OF APPLICANTS AND IDENTIFYING WITNESS:

We, who have hereunder signed our names, do solemnly swear (or affirm) that the answers given by us in this application for a marriage license are true, full and perfect answers to each and all of said questions.

MARRIAGE CEREMONY PERFORMED BY:
Cyril J. Galvin—Judge

ADDRESS: 1st Criminal Judicial Court
of Hudson County, Jersey
City, N. J.

DATE: July 9, 1954.

(Signature of Male Applicant):
(s) JOSEPH KOVACS.

(Signature of Female Applicant):
(s) AIDA SPECIALE BREWER.

(Signature of Identifying Witness):
(s) DOMENICA SPECIALE

SWORN (or affirmed) and subscribed before me at Jersey City, this 6th day of July 1954, at ..... A. M. ..... P. M.

(s) .....
Registrar.

License number .....

Issued (Date of issue) .....

Marriage performed in ..... on .....

[fol. 33] G. The aforesaid marriage record discloses that the defendant married none other than the same Joseph Kovacs, the co-respondent in my divorce action, who was living with the defendant in Jersey City when they were hiding my daughter. This is the man who the defendant wants this court to believe is suitable as a foster father for my daughter. The defendant's motion is not only insulting to me but must be absurd to this court. But this is not all. My investigation turned up some even more revolting facts. This same Joseph Kovacs from as far back as 1950, under Index No. 1400-1950, had been hauled into the Family Court in Manhattan by his wife, Ann Kovacs, for abandonment and non-support of his wife and their three small children. This file has been subpoenaed to aid the court in determining this motion. Moreover, in January of 1954 Kovacs' wife instituted an action for divorce in New York County Supreme Court under Index No. 30121-1954 against Kovacs in which after proof was offered of the adultery of Kovacs resulted in an interlocutory decree against him dated April 5, 1954 which became final on July 5, 1954. This file has been subpoenaed to aid the court in determining this motion. A further fact is significant—the minute book of the Kovacs divorce action shows no application made by him for leave of the Court to remarry, and of course three years have not elapsed since he was divorced. The fact is that the very next day after the decree became final against Kovacs, he applied in Jersey City for a license to marry my former wife, the defendant herein. In his application Kovacs failed to state that the divorce was against him and not in his favor (see the Kovacs Jersey City marriage record hereinbefore set forth).

H. There is further fact regarding the defendant that warrants the Court's attention. I was of the opinion that the defendant became a member of the Emory Methodist Church in Jersey City in 1951 just for a build-up. The [fol. 34] record of her membership bears out my opinion. After her motions were defeated her devout conduct came to a halt. The text of a letter dated December 10, 1954 from the present pastor of that church speaks for itself:

EMORY METHODIST CHURCH
Jersey City 4, N. J.

Office of the Minister
REV. PAUL N. JEWETT
140 Belmont Avenue

December 10, 1954

Mr. Alfred E. Buck
165 Broadway
New York 6, N. Y.

Dear Mr. Buck:

In reply to your request for information regarding the status of the membership and interest of Mrs. Ida Brewer in this church, I am able to supply the following facts:

Mrs. Brewer united with Emory Church on December 2, 1951 on Confession of Faith. She was received by the Rev. Lawrence Richards, Pastor, at that time. Her address at that time, or at some time subsequent to that, was 36 Prospect Street, Jersey City, as that is the address listed with her name.

I have no record of the extent of her participation in the life of the church, except of her financial support. Her account shows the following most recent contributions:

June 15, 1952	$1.50
Thanksgiving, 1952	2.00
February 1953	1.50
June 8, 1953	1.50

Since my assuming the Pastorial Office here in July 1953, I do not recall having met Mrs. Brewer, or at least have not seen her often enough to know her.

[fol. 35]

Very truly yours,

(s) PAUL N. JEWETT
Pastor.

4. My daughter, Jane, has now been living with us for over three years in my home at Gaston, North Carolina, where she is happy, is treated kindly and with love and affection. I am able to get leave so that I get home almost

every week. Jane is now attending school and is in the third grade. She has had a perfect attendance record in Shiloh Methodist Church in Gaston, North Carolina for over three years. She has never missed a Sunday in Sunday School and Church. My foster mother is a registered nurse and is devoted to Jane and to me. Jane has many playmates of her own age and can play safely near our home without danger of traffic or other injuries. She also attends dancing school with children of her own age and enjoys it very much. The school Jane attends is not over a half-mile from my home and my father takes her back and forth to school every day in his car.

5. The defendant's motion papers attempt to ridicule the community in which my home is located. I respectfully refer this court to the fact that the citizens of Gaston, North Carolina are respected and respectable people and live right in the same community with us and the affidavits of some of these citizens are annexed hereto in opposition to the defendant's motion. The defendant complains about the odors of paper and cotton mills in the South and yet the defendant, years ago, considered it safe for Jane to be brought up on the sidewalks of Harlem and when she took up residence in Jersey City, the defendant had little concern for the dangers of traffic or the odors of the Secaucus pig raising industry hard-by her homes in Jew Jersey.

WHEREFORE, I respectfully urge this Court to deny the defendant's application for a change in the custody of my [fol. 36] daughter for the reasons:

A. That the defendant has once more contemptuously flaunted and evaded the laws of the State of New York by remarrying without leave of this Court;

B. That in the face of such contempt for the laws of this State, her application herein and her effort to curry the aid and sympathy of this Court for herself without regard for the welfare of my daughter, in brazen and insulting to this Court;

C. That the home which the defendant maintains is suitable for Jane to be ordered into by this Court is supported

by an individual who was the co-respondent in my divorce action;

D. That the individual the defendant urges upon this Court as suitable to be a loving, kind and considerate foster-father for my daughter is none other than one who had to be brought into the Family Court by his then wife because he failed to support her and their three small children, and who has just been divorced by his wife;

E. That both the defendant and the said Joseph Kovacs have long held the laws of the State of New York and the orders of its courts to be of no consequence, but only until for their selfish purposes and vindictiveness they attempt to enlist the court's aid.

F. That the best interests of the health, welfare, and happiness of my daughter will be served if the custody provision of Judge Walter's decision remains unchanged and my daughter remains in my home.

And I further respectfully urge this court to grant me such other and further relief as to this court may seem [fol. 37] just and proper, together with the costs of this motion.

George A. Brewer, Jr.

Sworn to
12-15-54

Affidavit of George A. Brewer

Supreme Court—New York County

File No. 15950–1950

State of North Carolina
County of Northampton

George A. Brewer, being duly sworn, deposes and says:

1. I am the paternal grandfather of Jane Elizabeth Brewer and live in the Town of Gaston, County of Northampton, North Carolina, of which county and state I have always held my residence. I have been Justice of the Peace

for approximately 17 years, having been originally appointed by the Governor of North Carolina, Hon. J. Melville Broughton, and since by the State Legislature. I was one of the first Commissioners of the Town of Gaston, which town I was instrumental in having incorporated. I filled the unexpired term of Mayor in the second year.

2. I am a member of Shiloh Methodist Church in which I have held the position of Chairman of the Official Board for a period of eight years, and as the teacher of the adult class for about 12 years. I am 63 years of age and have not had any confining illness for the past three years except a mild attack of "flu" which lasted only three days. It is true that I am a diabetic and have had coronary thrombosis, yet I have been able to work continuously for the past three years except as I have stated.

3. Jane was placed in my custody by this court but was immediately taken in hiding by her mother, Aida Brewer [fol. 38] and Joseph Kovacs who was the co-respondent in her divorce case and who was living with her at the time we located them in Jersey City, New Jersey. Jane Brewer, my grand-daughter, has a brilliant memory and time and again has told us how she was left in a small room alone—and during a severe electric storm how scared she was and how she cried all alone. Mommy and Mr. Dunn, (as he was referred to or was known to her) Joseph Kovacs, were in one room and her grandmother in another and would not let her in. The affection which the defendant emphatically proclaims she holds for Jane should have been put into practice at that and many other times when she should have been at home instead of out with another man while her own husband was in the Navy. Jane is happy and content at our home and has never at any time cried or given the least sign or hint that she wanted to return to her mother. She does not seem to care whether or not her mother comes to see her. Often times when her mother notifies her that she will not visit her on visiting days, Jane says, "Good, now I can get out of the house." and seems very pleased.

4. As for the man Joe Kovacs wishing to lavish so much love and affection on Jane—that could have been well

used on his own wife and three children before he deserted them and took up with another man's wife. This is the third attempt for the former Mrs. Aida Brewer, now Mrs. Kovacs, in establishing a happy home with two failures. Kovacs has made at least two attempts and at least one was without success. I wonder how much of the $150 per week would be left if Kovacs were to support his own family and if he still allows them to live in that crowded tenement which they occupied a few years ago?

5. It is my considered opinion that Mrs. Kovacs is not so eager for her "baby" but only wants revenge for having been cooked in her own broth.

[fol. 39] 6. As for our schools in Gaston. We have an elementary school and a high school in Gaston with seventeen teachers. The high school is a State accredited high school. (We also have a colored elementary school). We have adequate playgrounds and other recreational facilities such as baseball, basketball, football, vollyball, and softball, and a new and modern gym is nearing completion and will be second to none. Jane travels to school in my own car and does not have to use the school bus which is provided and which are modern and clean and with careful drivers.

7. Jane is bright in her studies—good in her work—talented in music and eager to participate in anything for the good of the school. Each summer she attends swimming classes at Roanoke Rapids Municipal Pool and has learned to swim. She also takes dancing lessons and singing in school.

8. My wife is a registered nurse and a good mother and she is entirely capable and willing to care for Jane. She has shown all the love for Jane that she ever did for her own two children. Moreover, Jane has not missed a single Sunday for nearly four years attendance at Sunday School. She, of her own accord, and much to our surprise, submitted herself a candidate for church membership. She prays nightly that the "Judge will say no to mama when she tries to get her back and that she will live with grandmother and granddaddy and daddy always.".

9. The defendant Mrs. Kovacs has visitation privileges twice a month yet there have been periods of as much as seven weeks in which she did not come, and some of the time we have had to wait for her and deprive ourselves of privileges we could have had if only we had known she would not come.

10. I admit that there are great institutions of learning, [fol. 40] great churches, wonderful shows, magnificent hotels, beautiful parks and much culture to be found in the wonderful city of New York, and there are some wonderfully nice people. But there are also dens of vice, bad slums, gutter rats, vicious criminals, moral degenerates and human riff-raff from all parts of the globe who land in this very wonderful city. Taken as a whole I feel quite confident that the environment of a person in the social bracket of the defendant who is so desperately trying to get the custody of Jane would not elevate Jane's station in life but would place her in the same category of her maternal relatives including her mother. And as for "Tobacco Road," the homes in Gaston are mostly all owned by the occupants and no one is forced to move at the slightest provocation. And our mild climate does not necessitate the extremes in building. Comfort and convenience that one can afford is all that is necessary. We do know our townspeople and our friends in the country and know them for what they REALLY ARE. And as for the things she brings to Jane, for the most part they are unnecessary and not really cared for very long. She brings what she chooses and is not requested to contribute in any way to Jane's support or to give her clothes or money. Whatever she brings is of her own volition. My income is quite sufficient to make life comfortable and with what George allots from his Navy pay is adequate for some of the luxuries as well.

George A. Brewer.

Sworn to 12-15-54

Affidavit of A. E. Brown

State of North Carolina
County of Northampton

A. E. Brown, being duly sworn, deposes and says:

[fol. 41] This is to certify that as pastor of Shiloh Methodist Church of Gaston I have known Mr. George A. Brewer, Sr. and Mrs. George A. Brewer for a full year, since I became minister of that church. There has never been two finer, more sincere Christians than these two people.

Mr. Brewer, Chairman of our Board of Officials, teacher of the adult Bible class of the church school and the most active and reliable layman of my church, never misses any service of any kind in his church. His small granddaughter, Jane, always goes with him and Mrs. Brewer and she loves to go.

Mrs. Brewer is a teacher of small children in our church school. She is a registered nurse and is a kind, gentle, loving person, fully qualified in every way to give Jane motherly care and Christian nurture and training that she so badly needs at this period of her life.

Every child needs to feel that they are wanted and welcome in a home. The home of Mr. Brewer is a cozy bungalow, beautifully situated on a hill, small but adequate and neat. The most important fact about this home is the warm friendliness and firm discipline. This I know to be true by intimate acquaintances and frequent visits in the home for meals.

The court has made a wise decision to place this child in the capable, loving hands of grandparents where she can enjoy the freedom and health of fresh air and warm sunshine in North Carolina.

Because of the fine example and kindly, Godly interest of these parents, with no urging from them and really without any consultation, during our Spring evangelistic meeting, Jane came forward to make a public confession of [fol. 42] Christ and joined the church of her own free will. This demonstrates more than any words of mine or anyone else that she is in the right environment.

She has reached a pin from the church school for perfect attendance the last three years.

I have no hesitation out of love and interest in the child herself, in heartily recommending that the present arrangement be continued for Jane's best interest.

Rev. A. E. Brown.

Sworn to 12-15-54

AFFIDAVIT OF BLAIR T. GIBSON

State of North Carolina
County of Northampton

Blair T. Gibson, being duly sworn, deposes and says:

Statement regarding Mr. Geo. A. Brewer of Gaston, N. C.

I have known Mr. Brewer for a period of eight years and during the past three years I have known him rather intimately.

Mr. Brewer is a man of the very finest Christian character and integrity, an officer of the Gaston Methodist Church and a leader in his community.

Mr. Brewer was manager of P. I. Rook & Son Company of Gaston, N. C. This company was a general merchandise store and did a substantial business in Eastern North Carolina and Southside Virginia.

Upon the death of Mr. Rook I employed Mr. Brewer as manager of Gibson Hardware & Furniture Company of Roanoke Rapids, N. C. As manager of this business he is called upon to perform duties in exactly the same func-
[fol. 43] tion as if he were the owner. This is a position of trust and his performance leaves nothing to be desired.

I have been a guest in Mr. Brewer's home on several occasions during the past few years and I was greatly impressed with the many fine things that are found there that go to make a house into a home. This home is well furnished and comfortable to a degree that would satisfy a great majority of people in any section of the country. The outstanding characteristic of Mr. Brewer's home is

the Christian influence that is shown at all times by Mr. and Mrs. Brewer and their family.

I have known Mr. Brewer's granddaughter and she is most definitely a happy and normal child. As a father of two daughters, I cannot see how any child receives more attention and affection than is given to this child. Her every move clearly shows that she is a happy and contented child. She has the vest advantages of any child in this entire area, good schools, supervised playground and recreational facilities, and above all a good home and church training.

Gaston, N. C. is in fact a suburb of Roanoke Rapids, N. C. and predominately white. The ratio of white and colored is approximately 8.5 to 1.5. I would classify the population as upper middle-class and about 80% own their own homes. This community has a population of about 1250 which is served by five white churches and one colored church, one grade school and one fully accredited high school for both white and colored children. Gaston is also served by approximately thirty businesses and one theatre.

Mr. Brewer is 63 years of age and is in good health for a man of his age. He is able to perform his duties in a satisfactory manner. Even though I am not trained in [fol. 44] medicine I would express an opinion that he is in good health and capable of performing his duties both at work and at home.

I certify that this statement is true and factual.

Blair T. Gibson
President Blair Gibson
Inc. Roanoke Rapids NC

Sworn to 12-15-54

AFFIDAVIT OF LILLIAN REID

State of North Carolina
Count of Northampton

Lillian Reid, being duly sworn, deposes and says:

To Whom It May Concern:

Jane Brewer is in my third grade at Gaston School. She does well in her scholastic work and is one of my top-ranking pupils. She gets along well with her classmates. They all like her very much.

Lillian Reid
Third Grade Teacher
Gaston School

Sworn to 12-15-54

AFFIDAVIT OF RAZ AUTRY

State of North Carolina
County of Northampton

Raz Autry, being duly sworn, deposes and says:

To Whom It May Concern:

This is to inform that Gaston, North Carolina possesses the largest school in Northampton County, with an enrollment of 450; 17 teachers with Class A certificates. Two on the faculty possess Master's Degrees. The school is composed of two complete buildings, an elementary building and a high school.

The P. T. A. answers the call of their school far above [fol. 45] its duty. Mr. George Brewer is an active member of the Gaston P. T. A. Mrs. Brewer is a grademother in the third grade.

Their concern about the child in question is beyond reproach.

Sincerely yours,

Raz Autry
Principal Gaston School

RA/ITA
Sworn to 12-15-54

AFFIDAVIT OF F. G. KRONCKE

State of North Carolina
County of Northampton

F. G. Kroncke, being duly sworn, deposes and says:

To Whom It May Concern:

Mr. George Brewer of Gaston, N. C. is under my professional care. During the past year Mr. Brewer has not required any care for his coronary artery disease or for his diabetes. He is able to work eight hours daily and is fully able to care for and support his granddaughter, Jane Brewer.

It is my opinion that Mr. Brewer is now improved physically as compared to one year ago.

Mrs. George Brewer is also able to care for Jane Brewer. Mrs. Brewer has no physical impairment.

(s) F. G. Kroncke, M.D.
Roanoke Rapids, N. C.

Sworn to 12-15-54

AFFIDAVIT OF JOHN C. GAY

State of North Carolina
County of Northampton

John C. Gay, being duly sworn, deposes and says:

[fol. 46] To Whom It May Concern:

I have known Mr. George A. Brewer for the past twenty years. He is a man of good character and well respected in our community. He was at one time Mayor of our town. He has been a Sunday School Teacher in the Methodist Church for a number of years.

The Town of Gaston was incorporated in 1949 with a population of 1218, 85% white. Gaston has the largest white elementary and high school in Northampton County. It also has a Negro elementary school and the Negro high school students are transported by county school

buses to a Negro high school in Garysburg, North Carolina.

We have six churches and thirty or more business places in Gaston. Seventy-five per cent of the people in Gaston own their own homes. North Carolina State Highways 46 and 47 run through the town. Gaston is separated from the City of Roanoke Rapids, population 16,000, by the Roanoke River.

John C. Gay
Mayor of Town of Gaston.

Sworn to 12-15-54

AFFIDAVIT OF W. H. PRUDEN

State of North Carolina
County of Northampton

W. H. Pruden, being duly sworn, deposes and says:

To Whom It May Concern:

This is to certify that I have known Mr. George Brewer for the past forty years and have always found him to be a gentleman of the highest character. I think anyone living in the home of Mr. Brewer is very fortunate because I am sure that his home is a good Christian home. He is a man who is well liked not only in his own immediate community but in the surrounding communities [fol. 47] by all who know him.

Mr. Brewer lives in Gaston, North Carolina which is separated from Roanoke Rapids only by the Roanoke River. The city limits of Gaston come to the southern boundary of the river and the city limits of Roanoke Rapids extend to the Northern boundary of the river. Gaston is a progressive community with an excellent school, excellent churches and a very good business section. We, of Roanoke Rapids, look on Gaston as a part of our community.

In Roanoke Rapids we have some of the finest corporations in the country. We have the oldest pulp mill in the United States, the largest damask mill in the world and

other corporations of equal standing. We have one of the finest high schools in the State; a high school for our colored population and four graded schools in our town. We have approximately fifteen churches of all denominations. In our town there is an up-to-date police department and fire department with 24-hour service offered for the residents of our community and surrounding communities. We have a modern hospital with a new addition just being completed and two medical clinics just completed that are second to none. Our recreation program is a full-time program that would be a credit to any community. Our community is composed of approximately 16 to 17,000 citizens. We believe we have just as much to offer any person living in Roanoke Rapids and Gaston as could be offered any place. We also have a payroll of approximately $250,000 per week in our city.

Assuring you that I gladly give you this information, I am,

Very truly yours,

W. H. Pruden,
Mayor of Roanoke Rapids, N. C.

Sworn to 12-15-54

[fol. 48] AFFIDAVIT OF ERIC NORFLEET

North Carolina
Northampton County

Eric Norfleet, being first duly sworn, says that he is a resident and freeholder in the above county and state, and since 1921 has been a practicing attorney at Jackson in said county and state; that he retired as Judge of the Recorder's Court of Northampton County in December 1952, which position he had held without interruption for 18 years prior to that time.

That for a period of approximately 25 years he has known personally George A. Brewer, Sr., and for approximately 15 years has known George A. Brewer, Jr. That both men enjoy enviable reputations in Northampton County.

That on this date, he has had a private interview with Jane Elizabeth Brewer, whom he is advised is the daughter of George A. Brewer, Jr. This affiant was favorably impressed with the intelligence of this child. I am convinced that it is the desire of this child to remain in the custody of her grandfather and as a resident of Northampton County. Jane expressed to me pleasure in attending the local school, Sunday School and her pleasure at having recently become a member of the local Methodist Church. She further expressed her pleasure at the treatment received by her from her grandfather and grandmother, and her anticipation of a visit from Santa Claus within a few days. She also discussed with me the fact that she enjoyed the visits of her mother, but that she desired to continue to live with her paternal grandparents.

Eric Norfleet.

Sworn to 12-15-54

[fol. 49] AFFIDAVIT OF ALFRED E. BUCK

SUPREME COURT, NEW YORK COUNTY

File No. 15950—1950

GEORGE A. BREWER, JR.

v.

AIDA S. BREWER

State of New York
County of New York

Alfred E. Buck, being duly sworn, deposes and says:

1. That he is a member of the firm of Merchant, Olena, Buck & Santomenna, attorneys for the plaintiff herein, with offices at 165 Broadway, New York City 6, New York. Deponent has been in charge of all matters and proceedings

from the outset of this action and is fully familiar personally with all the facts.

2. Deponent makes this affidavit on behalf of George A. Brewer, Jr., plaintiff, in opposition to the motion of the defendant which she has brought by order to show cause for the purpose of attempting to gain custody of the eight (8) year old daughter of the parties.

3. This is the third motion which the defendant has brought for this purpose and in the light of the facts set forth in the papers annexed hereto, the defendant's motion should be denied peremptorily.

4. This motion regularly came on before Mr. Justice Brisach in Special Term, Part I on November 19, 1954, and was marked submitted with all papers to be handed in by Friday, December 17, 1954.

5. That deponent conferred with Mr. Justice Walter who tried the action for divorce herein and rendered his [fol. 50] verdict in favor of the plaintiff, our client, together with custody of the infant daughter to the plaintiff in his judgment of January 17, 1951. Mr. Justice Walter stated that if Mr. Justice Brisach thought he should take this motion, he would be glad to do so. Mr. Justice Walter took jurisdiction for the defendant's last motion for change of custody and denied such motion without opinion. Deponent believes that in the light of all the facts, this motion should be referred to Judge Walter for his final determination to put a stop to this continual effort on the part of the defendant in creating unrest and uncertainty on the part of the infant herein.

6. On Wednesday, December 15, 1954, deponent spent the entire day in Roanoke Rapids, Gaston and Jackson, North Carolina, observing the general economic and social conditions of the communities and in talking with the townspeople, storekeepers, children, and public officials. Deponent met the plaintiff, his daughter Jane, and the rest of the family in their home and observed the neat and comfortable manner in which their home was kept. Everyone with whom deponent could come into contact in the space of eleven hours gave evidence that Gaston was all

that the plaintiff and his friends were claiming for it and second the plaintiff and his family were really as highly regarded as the affidavits attached hereto would have one believe. I actually found financial prosperity, good business growth, considerable new construction, flourishing paper, cotton and rayon mills, very little and certainly not the obnoxious odors complained of by the defendant, no incidence of crime, a very high percentage of home ownership as compared with other parts of the country, and a very high degree of civic pride among all types of people. As for the reputation of the Brewer family all over this section of North Carolina, the written words of esteem as set forth in the affidavits attached are very commendable, [fol. 51] but to catch the warmth and depth of regard in which these people are held by their neighbors and all those to whom they are known would best be shown if it could have been recorded in pictures.

7. When deponent recently was informed that Jane had joined the Shiloh Methodist Church of Gaston, of her own volition, it seemed to deponent that she was old enough to speak for herself as to whether she was happy and wanted to stay in Gaston with her father and grandparents or preferred to go back to New York with her mother. Accordingly, late in the afternoon of December 15th, deponent had Jane brought to the offices of the Honorable Erie Norfleet at Jackson, a retired Recorder's Court Judge of Northampton County, North Carolina. Deponent requested Judge Norfleet to question Jane privately and as freely as he cared to on her wishes. Judge Norfleet's findings are set forth in his affidavit annexed hereto. They confirm deponent's own findings in all respects that not only does Jane want to stay with the Brewer family in Gaston, but also that her own best interests and welfare would best be served by having her remain with them.

Wherefore, deponent respectfully requests that this motion be referred to Mr. Justice Walter and that defendant's motion be denied with costs to the plaintiff and that plaintiff be granted such other and further relief as to this Court may seem just and proper..

Alfred E. Buck.

Sworn to 12-16-54

Petitioner offered in evidence as her Exhibit No. 2, a document referred to in stipulation of Fact (5) above:

[fol. 52] EXHIBIT 2

BREWER v. BREWER

Brisach, J.:

Plaintiff moves to modify the final decree of divorce insofar as it affects the custody of the child of the marriage between plaintiff and defendant. Plaintiff brought an action for divorce against the defendant upon statutory grounds and judgment was entered herein on January 17, 1951, granting plaintiff a judgment of divorce and awarding custody of the child, the issue of the parties to the paternal grandfather. The judgment provided with respect to the custody of the child as follows:

> "The question of the custody of the child remains. Even though I find defendant guilty of adultery, I would not, on that finding alone, take a four-year old girl from her mother if the mother's situation and surroundings were such as to promote the interest and well-being of the child. I think the best interests of the child require that she be placed in the custody of the plaintiff's father (her paternal grandfather) and the plaintiff asks that be done at least until he is discharged from the Navy."

Previous applications to modify this decision have been denied, presumably on the ground that there has been no material change in defendant's situation and surroundings. Defendant, however, is now remarried and is now living in an apartment in a desirable residential community in River dale, New York. Her situation is presently such as to permit the bringing up of the child, who is now eight years of age, in proper surroundings. The papers disclose that the plaintiff has re-enlisted and is now serving in the Navy and intends to continue such service and the infant [fol. 53] is now living with her paternal grandfather, who is admittedly a diabetic and suffers from coronary thrombosis. The accommodations and surrounds of the mother are acceptable for the welfare of the infant and would be

more desirable for an eight year old girl, whose bringing up belongs to her mother.

Plaintiff's reference to the fact that defendant remarried in the State of New Jersey without approval of this Court does not affect the validity of the remarriage. It is well settled that the prohibition against remarriage contained in Section 8 of the Domestic Relations Law has no extraterritorial effect (FISHER v FISHER, 250 NY 313, 318).

Accordingly the motion is granted and custody of the child is awarded to the defendant, providing for reasonable visitation by the plaintiff as he may desire.

Settle order on one day's notice.

Dated: December 23, 1954.

E. L. B.

PETITIONER RESTS.

IN SUPERIOR COURT OF NORTHAMPTON COUNTY

Defendant's Evidence

Defendant offered in evidence the following affidavits:

AFFIDAVIT OF REBECCA LONG

Rebecca Long, being first duly sworn, says:

That she is the Assistant Clerk of Court of Northampton County, North Carolina; that in said office the general registration books for each voting precinct in said county are deposited for safekeeping as required by law; that in said registration book for East Gaston Precinct, Northamp-
[fol. 54] ton County, N. C., and on Page 9 thereof and line 5 appears the name "G. A. Brewer, Jr.," as a registered voter of said precinct and according to said record the said G. A. Brewer, Jr. voted in 1952, 1954 and 1956 in said precinct.

That to the personal knowledge of said affiant East Gaston Precinct includes the Town of Gaston in said County of Northampton.

Rebecca Long, Assistant Clerk of Superior Court.

Sworn to 9-12-56

Affidavit of Lillian Reid

Lillian Reid, being duly sworn, deposes and says: That Jane Elizabeth Brewer was a pupil of mine while in third grade at Gaston School, Gaston, North Carolina. She did well in her scholastic work and was one of my top ranking pupils. She got along well with her classmates. They all like her very much.

Since I have been a teacher in the above school, I have known Mr. and Mrs. George A. Brewer, Sr. They are people of good reputation and standing, and, in my opinion, are fit and suitable persons to have the custody of said child.

Lillian Reid.

(Sworn to 8-30-56)

Affidavit of Mrs. Cornelia Moore

Mrs. Cornelia Moore, being duly sworn, deposes and says:

That she has known Mr. and Mrs. George A. Brewer, Sr. for a number of years, and is a next door neighbor of Mr. and Mrs. Brewer. That she is a constant visitor in the home of Mr. and Mrs. Brewer, who in turn are con- [fol. 55] stant visitors with this affiant. That the home of Mr. and Mrs. Brewer is a comfortable, modest and average home for the community in which they live. That the environment thereof is that of christian, God-fearing people. That this affiant has known for some years, Jane Elizabeth Brewer, the grandchild of Mr. and Mrs. George A. Brewer, Sr. That she is a bright and attractive child, happy in her surroundings and contented in the affection and parental care given her by her grandparents.

That Mr. and Mrs. George A. Brewer, Sr. are people of excellent reputation and standing in their community, and in the opinion of this affiant, they are suitable and fit persons to have the custody of their grandchild, Jane Elizabeth Brewer.

Mrs. Cornelia Moore.

(Sworn to 8-30-56)

AFFIDAVIT OF MRS. IRENE HOBBS

Mrs. Irene Hobbs, being first duly sworn, deposes and says:

That she has known Mr. and Mrs. George A. Brewer, Sr. for a number of years, and has known Jane Elizabeth Brewer, their granddaughter, for several years. That Jane was in the Sunday School class of Shiloh Methodist Church taught by this affiant, and is a faithful attnedant (sic) at the services of said church school and at the services of said church. Mr. and Mrs. Brewer are also faithful members of said church and constant attendants at the services thereof.

That in my opinion, Mr. and Mrs. Brewer are people of excellent reputation and standing in their community and are fit and suitable persons to have the custody of their grandchild, Jane Elizabeth Brewer.

Mrs. Irene Hobbs.

(Sworn to 8-30-56)

[fol. 56] AFFIDAVIT OF MRS. R. T. CROSS

Mrs. R. T. Cross, being first duly sworn, deposes and says:

That she knows Jane Elizabeth Brewer, and when said child was a member of the fourth grade of Gaston School, Gaston, N. C. she was taught by this affiant. That she is a bright, efficient child and happy and contented in her environment.

That I have known Mr. and Mrs. George A. Brewer, Sr. for a number of years. They are people of excellent reputation and standing in their community and in the opinion of this affiant, are fit and suitable persons to have the custody of their grandchild, Jane Elizabeth Brewer.

Mrs. R. T. Cross.

(Sworn to 8-30-56)

Affidavit of Blair T. Gibson

Blair T. Gibson, being duly sworn, deposes and says:

That he is a resident and freeholder of Halifax County, North Carolina, residing in Roanoke Rapids in said county. That he has known Mr. George A. Brewer, Sr. of Gaston, N. C. for about ten years, and in the years 1952, 1953 and 1954 knew him intimately.

That Gaston and Roanoke Rapids are contiguous towns, separated only by Roanoke River.

Mr. Brewer is a man of the very finest christian character and integrity, and officer of the Gaston Methodist Church and a leader in his community.

For some years, Mr. Brewer was manager of P. I. Rook & Son Company of Gaston, N. C. This company was a general merchandise store and did a substantial business [fol. 57] in Eastern North Carolina and southside Virginia. Upon the death of Mr. Rook, I employed Mr. Brewer as Manager of Gibson Hardware & Furniture Company of Roanoke Rapids, N. C. He continued in this capacity for some three years. As Manager of this business, he was called upon to perform duties in exactly the same function as if he were the owner. This was a position of trust and his performance was satisfactory in every respect.

I have been a guest in Mr. Brewer's home on several occasions during the past few years, and I was greatly impressed with the many fine things that are found there that go to make a house into a home. This home is well furnished and comfortable to a degree that would satisfy a great majority of people in any section of the country. The outstanding characteristic of Mr. Brewer's home is the christian influence that is shown at all times by Mr. and Mrs. Brewer and their family.

I know Mr. Brewer's granddaughter, Jane Elizabeth Brewer, and she is most definitely a happy and normal child. As a father of two daughters, I cannot see how any child receives more attention and affection than is given to this child. Her every move clearly shows that she is a happy and contented child. She has equal ad-

vantages of any child in this entire area, good schools, supervised playground and recreational facilities, and above all, a good home and church training.

Gaston, N. C. is in fact a suburb of Roanoke Rapids, N. C. and predominantly white. The ratio of white and colored is approximately eight and five-tenths to one and five-tenths. I would classify the population as upper middle class and about eighty percent own their homes. This community has a population of about 1250, which is served by five white churches and one colored church, one grade school and one fully accredited high school for [fol. 58] white children. The colored children are served by separate schools.

In my opinion, Mr. and Mrs. Brewer are people of excellent reputation and standing in their community, and are fit and suitable persons to have the custody of Jane Elizabeth Brewer.

Blair T. Gibson.

(Sworn to 8-30-56)

AFFIDAVIT OF JOHN C. GAY

John C. Gay, being duly sworn, deposes and says:

That he is now and has been for some years Mayor of the Town of Gaston, North Carolina.

That I have known Mr. George A. Brewer, Sr. for the past twenty years, and have also known Mrs. George A. Brewer. That they are people of excellent character and standing in their community, and in the opinion of this affiant, are fit and suitable persons to have the custody of their grandchild, Jane Elizabeth Brewer.

Mr. Brewer at one time was Mayor of Gaston, N. C. He has been a Sunday School teacher in the Methodist Church for a number of years and has been a faithful attendant at services.

John C. Gay.

(Sworn to 8-30-56)

Affidavit of W. H. Pruden

W. H. Pruden, being duly sworn, deposes and says:

That he is now and for some years has been Mayor of the City of Roanoke Rapids, North Carolina.

That he has known Mr. George A. Brewer, Sr. for the [fol. 59] past forty years and has always found him to be a gentleman of the highest character. That anyone living in the home of Mr. Brewer is very fortunate because of the fact that his home is a good christian home. He is a man who is well regarded not only in his own immediate community, but in the surrounding communities by all who know him.

Mr. Brewer lives in Gaston, North Carolina, which is separated from Roanoke Rapids only by the Roanoke River. Gaston, is a progressive community, with an excellent school, excellent churches and a very good business section. We, of Roanoke Rapids, look on Gaston as a part of our community.

In Roanoke Rapids, we have some of the finest corporations in the country. We have the oldest Pulp Mill in the United States; the largest Damask Mill in the world and other corporations of equal standing. We have one of the finest high schools in the state, together with graded schools of equal standards. We have approximately fifteen churches of all denominations. In our town, there is an up-to-date Police Department and Fire Department with twenty-four hour service offered for the residents of our community and surrounding communities. We have a modern hospital with a new addition, and two medical clinics just completed that are second to none. Our recreation program is a full time program that would be a credit to any community. Our community is composed of approximately sixteen to seventeen thousand citizens. We believe we have just as much to offer any person living in Roanoke Rapids and Gaston as could be offered any place.

In my opinion, Mr. George A. Brewer, Sr. and his wife, Mrs. George A. Brewer, are people of excellent reputation and standing in their community, and are fit and

suitable persons to have the custody of their grandchild, [fol. 60] Jane Elizabeth Brewer.

W. H. Pruden.

(Sworn to 8-30-56)

AFFIDAVIT OF GEORGE R. AUTRY

George R. Autry, being duly sworn, deposes and says:

That he is now and for two years has been principal of Gaston High School at Gaston, North Carolina. The school has an elementary building and a high school building. This is one of the largest schools in Northampton County.

I have known Mr. and Mrs. George A. Brewer, Sr. for several years, and know their granddaughter, Jane Elizabeth Brewer, who has been an outstanding student in the Gaston school for several years.

In my opinion, Mr. and Mrs. Brewer are people of excellent reputation and standing in their community and are fit and suitable persons to have the custody of the said Jane Elizabeth Brewer.

Both Mr. and Mrs. Brewer are active members and workers in the Parent Teacher Association of the Gaston School.

George R. Autry.

(Sworn to 8-30-56)

AFFIDAVIT OF MRS. W. W. GRANT, JR.

Mrs. W. W. Grant, Jr., being first duly sworn, deposes and says:

That she is a resident of Gaston Township, Northampton County, North Carolina, and has resided for many years just outside of the corporate limits of the Town of Gaston in said county. That for many years she has known Mr. and Mrs. George A. Brewer, Sr., Gaston, N. C. That they are people of excellent character and reputa- [fol. 61] tion in their community, and are fit and suitable

persons to have the care and custody of their grandchild, Jane Elizabeth Brewer.

Mrs. W. W. Grant, Jr.

(Sworn to 8-31-56)

AFFIDAVIT OF M. L. JORDAN

M. L. Jordan, being first duly sworn, deposes and says:

That he is now and has been for a number of years a merchant in the Town of Gaston, North Carolina. That he has personally known Mr. and Mrs. George A. Brewer, Sr., Gaston, N. C., for many years. That they are people of excellent character and reputation in their community, and in the opinion of this affiant, are fit and suitable persons to have the care and custody of their grandchild, Jane Elizabeth Brewer.

M. L. Jordan.

(Sworn to 8-30-56)

AFFIDAVIT OF H. L. JOYNER

H. L. Joyner, being first duly sworn, deposes and says:

That he is now and for a number of years has been Chief of Police of the Town of Gaston, North Carolina. That he has known Mr. and Mrs. George A. Brewer, Sr. for a number of years. That Mr. and Mrs. Brewer are people of excellent character and reputation in the Gaston community, and in the opinion of this affiant are fit and suitable persons to have the care and custody of their grandchild, Jane Elizabeth Brewer.

Hinton L. Joyner.

(Sworn to 8-30-56)

[fol. 62] AFFIDAVIT OF S. ELLIS CREW

S. Ellis Crew, being duly sworn, says:

That he is now and for a number of years has been a member of the County Board of Education of Northamp-

ton County. That he has been and is now vitally interested in Gaston schools, both elementary and high school.

That he has known Mr. and Mrs. George Brewer, Sr. for a number of years. That both Mr. and Mrs. Brewer have been interested, have worked for and have been valuable citizens of their community in maintaining the high standards for their school.

That Mr. and Mrs. Brewer are people of excellent character and reputation in their community, and are fit and suitable persons to have the care and custody of their grandchild, Jane Elizabeth Brewer.

S. Ellis Crew.

(Sworn to 8-30-56)

AFFIDAVIT OF DR. F. G. KRONCKE

Dr. F. G. Kroncke, being duly sworn, deposes and says:

Mr. George A. Brewer, Sr., of Gaston, N. C. is under my professional care. During the past year, Mr. Brewer has not required any care for the coronary artery condition or for his diabetes. In my opinion he is able to work and properly supervise the maintenance and care for his granddaughter, Jane Elizabeth Brewer.

I know Mrs. George A. Brewer, Sr., who is a registered nurse, and I know that she has no physical impairment. [fol. 63] In my opinion, George A. Brewer, Sr. is a person of good reputation and standing in his community, and a fit and suitable person to have the custody of his grandchild, Jane Elizabeth Brewer.

F. G. Kroncke.

(Sworn to 8-30-56)

AFFIDAVIT OF A. E. BROWN

A. E. Brown, being duly sworn, deposes and says:

That as Pastor of Shiloh Methodist Church of Gaston, North Carolina, I have known Mr. George A. Brewer, Sr.,

and Mrs. George A. Brewer for approximately two and one-half years, dating from the time I became Minister of that church. There has never been two finer, more sincere christians than these two people.

Mr. Brewer is Senior Trustee of our Board of Stewards, Teacher of the Adult Bible Class of the Church School and the most active and reliable layman of my church, never misses any service of any kind in his church. His granddaughter, Jane Elizabeth Brewer, always goes with him and Mrs. Brewer and she loves to go to such services.

Mrs. Brewer is a teacher of small children in our Church School. She is a registered nurse and is a kind, gentle, loving person, fully qualified in every way to give Jane motherly care and christian nurture and training that she badly needs at this period of her life.

Every child needs to feel that they are wanted and welcome in a home. The home of Mr. Brewer is a cozy bungalow, beautifully situated on a hill, small, but adequate and neat. The most important fact about this home is the warm friendliness and firm discipline. This I know to [fol. 64] be true by intimate acquaintance and frequent visits in the home for meals.

In my opinion, the place for this child is in the capable, loving hands of her grandparents where she can enjoy the freedom and health of fresh air and warm sunshine in North Carolina.

Because of the fine example and kind, Godly interest of these grandparents, with no urging from them, and really without any consultation, during our spring evangelistic meeting in 1954, Jane came forward to make a public confession of Christ and joined the church of her own free will. This demonstrates more than any words of mine, or anyone else, that she is in the right environment.

This child has received a pin from the Church School for perfect attendance for the last five years.

I have no hesitation, based on my knowledge of their affection for the child herself, and her grandparents, in heartily stating that such grandparents are of excellent reputation and standing and fit and suitable persons to have the custody of said child.

Rev. A. E. Brown.

(Sworn to 8-30-56)

Affidavit of Janet B. Brown

Mrs. Janet B. Brown, being duly sworn, deposes and says:

That she is now and since 1943 has been Superintendent of Public Welfare for Northampton County, N. C., and resides at Rich Square, in said county.

That for a number of years she has known Mr. and Mrs. George A. Brewer, Sr., who reside at Gaston, in Northampton County. That on August 30, 1956, this affiant visited the home of the said Mr. and Mrs. George A. Brewer, Sr., and had an opportunity to make some examination in re-
[fol. 65] spect thereto. That said home is attractive in appearance, comfortable and modest. It is complete with bath, hot and cold water, is heated with an oil heater floor furnace and has a gas heater in the fireplace which may be used as auxiliary heat in case of severe weather.

That the home of the said Mr. and Mrs. George A. Brewer, Sr. is located in a growing community of Northampton County, and is immediately available to an accredited high school and elementary school of Northampton County.

That on the occasion of my visit on August 30, 1956, I met and talked with Jane Elizabeth Brewer, the granddaughter of George A. Brewer, Sr. She is bright, attractive and contented. She stated to me that she loved her grandparents, Mr. and Mrs. George A. Brewer, Sr., was happy with them and desired to continue to live with them. She stated that she was happy in school and with her many friends that she has made in that community. She exhibited to me a pin which had been awarded to her by her Sunday School Class for five years perfect attendance and stated that she was now working on a pin to cover an additional year.

Mr. and Mrs. George A. Brewer, Sr. are people of excellent reputation and standing in their community, and in the opinion of this affiant, are fit and suitable persons to have the custody of their grandchild, Jane Elizabeth Brewer.

Janet B. Brown.

(Sworn to 9-10-56)

Affidavit of Annie B. Brewer

Annie B. Brewer, first being duly sworn, says:

[fol. 66] I am the wife of George A. Brewer, Sr., the grandfather of Jane Elizabeth Brewer. Jane lives with us and her custody was given to my husband by the New York Supreme Court.

I have two children of my own, one girl, who is married, and one son in U. S. Navy. I graduated from the Roanoke Rapids Hospital of Nursing in 1927 and therefore have advantage over most mothers. This training has been helpful to me many times, particularly in respect to attention to my children and to Jane.

Since coming here with us in Gaston, Jane has been examined by the doctor on routine check-ups, and has actually been treated only twice in more than two years. When she came with us, her kidneys were bad. This condition has now been cleared up with proper diet. She has grown several inches in height and has gained in weight. She likes the out-of-doors and here she has splendid opportunities for play and good companionship with children her own age, next door, at school and in Sunday School and church. When she first came with us, she was nervous and frightened and would hide when anyone came to the house, but she has recovered from her fear. My husband is a Justice of the Peace and frequently the police are coming to the house on business and they have talked to Jane and told her how much police loved little boys and girls and she is no longer afraid, in fact she has made many friends with grown-ups as well as with children.

We take her to Sunday School every Sunday and she looks forward to this constantly during the week. She is in the fifth grade in the Gaston Elementary School and looks forward to her attendance. Her teacher says that she is friendly, cooperative and a very good student.

Our house is a modern four-room building with bath and hot and cold water and comfortably heated. Not so [fol. 67] long after Jane came to us, I was helping her with her bath and she told me that her mother and stepfather didn't have a bath tub like the one she was in, and

that they took a bath in a tin tub like I had to do the laundry in. On another occasion, we were sitting on our front porch when a storm was coming up and she said; "One night when we were in New Jersey a storm came up and it was raining hard and it was going boom, boom, real loud and I cried and called my Mommy because I was afraid." We asked Jane where her mother was. She said, "Mommy was in the other room and she couldn't go in the room for because she went to bed." We asked her why and she said, "Mr. Dunn slept with Mommy." We asked, "Why didn't you go in and sleep with your grandmother?" Jane replied, "The bed was too small and she slept across the hall in a little room." We asked Jane why her grandmother didn't sleep with her and she said, "My room was too small." Also on another occasion while we were all at the table eating lunch something was said about the South. Jane spoke up and said, "That's where the old mean stepmother lives and that's where there are lots of snakes that will eat you up." We asked Jane who told her this and she said, "My Mommy and grandmother." We asked her who this mean old stepmother was and she said, "I don't know."

Jane's father, George A. Brewer, Jr., who is my stepson, has been very faithful coming home every possible chance he could get leave to visit his daughter and us.

Jane has said many times that she doesn't want to go back to New York. She told one of our friends recently that if she went back to her Mommy, she would never let her see her Daddy again.

We are bestowing all of the love and affection on Jane that is within our power, and I pray each night that God [fol. 68] will help us to bring her up and to teach her those things which are right and best. Jane also prays each night, "Dear God, let me stay with my grandma, grandaddy and daddy always."

Annie B. Brewer.

(Sworn to 9-8-56)

Affidavit of George A. Brewer, Sr.

George A. Brewer, Sr., being duly sworn, says:

I am the Paternal Grandfather of Jane Elizabeth Brewer and live in the Town of Gaston, County of Northampton, North Carolina in which county and state I have always held my residence. I have been Justice of the Peace for approximately 19 years, having been originally appointed by the Governor of North Carolina, Honorable J. Melville Broughton, and since by the State Legislature. I was one of the first commissioners of the Town of Gaston, which town I was instrumental in having incorporated. I filled the unexpired term of Mayor in the second year. I am a member of Shiloh Methodist Church in which I have held the position of Chairman of the Official Board for a number of years, and as the teacher of the adult class for a number of years. I am 64 years old and have not had any confining illness for the past five years, except a mild attack of "flu," which lasted only three days. It is true that I am a diabetic and have had a coronary thrombosis, yet I have been able to work continuously for the past five years, except as I have stated.

The custody of my granddaughter, Jane Elizabeth Brewer, was granted me by the Supreme Court of New York in January 1951, but immediately she was taken in hiding by her mother, Aida Brewer and by Joseph Kovacs, who was the co-respondent in her divorce case, and is now [fol. 69] the husband of the said Aida Brewer, as I am advised. When my granddaughter was finally located in Jersey City, the said Aida Brewer and Joseph Kovacs were living together.

My granddaughter, Jane Elizabeth Brewer, has a brilliant memory, and time and again has told us how she was left in a small room, alone, during a severe electrical storm, and how scared and how she cried all alone. Jane is happy and content in our home and has never at any time cried or given the least sign or hint that she wanted to return to her mother. She doesn't seem to care whether or not her mother comes to see her. Often times when her mother notifies her that she will not visit her on

visiting days, Jane says, "Good, now I can get out of the house," and seems very pleased.

Jane has a swing, toys, dolls and doll house and a real outdoor playhouse. She plays with our dogs, has some bantam chickens all her own and canaries. She is amply protected with an enclosed yard from anything which could harm her. She has many young friends with whom she plays and visits. She attends church and Sunday School with me and my family and has enjoyed it very much. She has won an attendance pin for regular attendance at church school. She has the love and respect of her teacher and the other children in her class. Her health is good and she has had the doctor only twice since being with us, and that was for a minor upset stomach which lasted only a day. My wife is a registered graduate nurse and at the very first sign of anything wrong we would not hesitate to see the doctor.

In Gaston, N. C. where I live, we have an Elementary School and a High School with 17 teachers. The school is accredited by the State of North Carolina. We have adequate playgrounds and other recreation facilities. Jane travels to school in my own car. Each summer she at- [fol. 70] tends swimming classes at Roanoke Rapids Municipal Pool and has learned to swim. She also takes dancing lessons and singing in school.

As stated previously, my wife is a registered nurse and a good mother, and she is entirely capable and willing to care for Jane. She has shown all of the love for Jane that she would for her own two children. Under our care and instruction she has not missed a single Sunday for nearly six years attendance at Sunday School. She, of her own accord, submitted herself for church membership, and was accepted.

I own my own home, which is comfortable and modest, complete with bath, hot and cold water, heated with an oil heater floor furnace and there is a gas heater in the fireplace to be used as auxiliary heat in case of severe weather.

George A. Brewer, Sr.

(Sworn to 9-8-56)

AFFIDAVIT OF GEORGE A. BREWER, JR.

George A. Brewer, Jr., being duly sworn, says:

I am 37 years of age: On April 18, 1945, I married Aida Speciale in the City Hall in New York. On May 30, 1946, a child, Jane Elizabeth Brewer, was born to our marriage.

That on July 31, 1950, George A. Brewer, Jr. instituted an action for divorce against his wife on the grounds of adultery in the Supreme Court of the State of New York in and for the County of New York and Joseph Kovacs was named as co-respondent in the complaint filed in said action. That on January 17, 1951 said Court entered a decree of divorce in favor of George A. Brewer, Jr., against his said wife on the grounds of adultery with [fol. 71] Joseph Kovacs and awarded custody of the child, Jane Elizabeth Brewer, to George A. Brewer, Sr., the father of this affiant and grandfather of said child.

That Aida Brewer immediately went into hiding taking the child with her and that I looked in vain for them until on or about September 6, 1951, when I found them living with Joseph Kovacs at 21 James Avenue in Jersey City, and the Police Department of Jersey City took Jane in temporary custody and she stayed that night at the Jersey City Medical Center. The next morning, September 7, 1951, I obtained a writ of habeas corpus in Superior Court, Chancery Division, Jersey City, under Index No. M-192-1951, against Aida Brewer which was heard that same afternoon, following which immediate physical possession and custody of Jane was granted to me and the Jersey City Medical Center was directed by the Order of that Court to turn her over to me and to my father. That Aida Brewer told me in Jersey City at that time that "I don't care what the New York Court said, I'll take Jane any time I want." That ever since that time Jane has lived with my father and stepmother in Gaston, North Carolina. That my father has been a resident of and domiciled in Gaston, North Carolina for about twenty years.

I was a resident of the State of New York at the time the divorce was obtained. However, when the divorce was granted, I moved out of the apartment and had my things mailed to my home in Gaston, North Carolina. I no longer

had any intention of continuing to live in New York or of ever returning to New York, and I have not been in New York since my clothes were mailed home in 1951, except in the time in 1951 when I was searching and trying to find my daughter. When I mailed my things home, it was my intention to establish my home and residence in Gaston, North Carolina, and since that time, while I was not on [fol. 72] duty in the Navy, I have made my home with my father and stepmother and child in Gaston, North Carolina. I voted in Gaston North Carolina in 1952, 1954 and 1956. My automobile is registered and licensed in North Carolina. I did not have any car in 1951 and 1952 but bought an automobile in 1953 which was licensed by the Town of Gaston with license plate number 21 and licensed by the State of North Carolina with license number X40504 and which was licensed by the state and town in subsequent years, but I have lost these registrations except the 1956 State Registration which is for license number CN9827. Since I left New York, I have paid my federal income tax through the Greensboro, North Carolina Office. Since I left New York, I have spent on an average from twenty to twenty-five days per year, representing most of my leave, at my home in Gaston, North Carolina with my father, stepmother and child. That was on my annual leave and in addition, I have spent numerous week-ends at my home in Gaston. My service records show that my home and address is Gaston, North Carolina. Ever since I left the apartment following the divorce from my wife, I have been a resident of and domiciled in Gaston, North Carolina.

I am a Machinist Mate First Class in the United States Navy, and I am being paid base pay of $258.00 per month plus $77.10, the last mentioned sum being for the maintenance of Jane. From my pay, I have made an allotment of $80.00 per month to be paid to my father for the support of Jane. The total sum which my father receives and uses for the support of Jane is $157.10 per month which has been paid to my father ever since he has had the custody of Jane. However, I have an understanding with my father that if it is necessary for him to use any of these funds for his support and the support of my stepmother that he may do so.

That through the many visits which I have made and close observation of the things at home, that I have ob-
[fol. 73] served the great progress which Jane has been making in the care and custody of my father and step-mother and that I am entirely satisfied with the way that they are caring for and taking care of Jane. That she goes to church and school regularly and has a large circle of young friends to whom she is very closely attached. That to break at this time the ties which she has formed in Gaston would seriously and aversely affect her personality and outlook. That Jane has become used to and likes to live in the country. That I know from having lived in New York the environment in which she will live if her custody is awarded to the petitioner in this proceeding and that it would be detrimental to Jane.

I have known Aida Kovacs since 1944. That in the years of our marriage of necessity I knew her intimately, and in this intimacy, I learned definitely her idea of morals. That shortly before I married her I learned that she had been married and divorced. Since being divorced by me, she has married Joseph Kovacs who was named as co-respond-
[fol. 74] Defendant Rests.
ent in the divorce action which I brought against her. That the divorce decree required that she wait three years before re-marrying and that without obtaining permission from the Court she married Joseph Kovacs within less than three years after the divorce decree was granted. That Joseph Kovacs had also been divorced in an action brought against him by his wife on the grounds of adultery and that he was also required to wait for a certain period before remarrying, and he married my wife in less than that time without obtaining permission from the court to do so. As I am informed and believe, Joseph Kovacs had children by his former marriage whom he is now being required to support. That as affiant believes, neither Aida Kovacs or her husband, Joseph Kovacs, are fit and suitable persons to have the custody and care of my child.

Geo. A. Brewer, Jr.

(Sworn to 9-12-56)

Evidence Closed.

IN SUPERIOR COURT OF NORTHAMPTON COUNTY

APPEAL ENTRIES RESTATED WITH EXCEPTIONS NUMBERED:

The petitioner, Aida S. Kovacs, in apt time, excepts to each of the court's findings of fact numbered consecutively from 1 through 15 (Petitioner's Exception No. 1); to the conclusion of law stating "that this court, in passing upon the care, custody and control of Jane Elizabeth Brewer, is not bound by nor required to give effect to the decree of the court of the State of New York made in 1954 and hereinbefore referred to", (Petitioner's Exception No. 2); and to the signing of the judgment (Petitioner's Exception No. 3). Petitioner in open court gives notice of appeal to the Supreme Court of North Carolina. Further notice is waived. Appeal bond set at $150.00.

By consent, petitioner appellant given 45 days in which to prepare and serve case on appeal, and defendant appellee given 10 days thereafter to serve countercase or file exceptions.

This 10th day of December 1956.

Henry L. Stevens, Jr., Judge Presiding over the Courts of the Sixth Judicial District.

[fol. 75] IN SUPERIOR COURT OF NORTHAMPTON COUNTY

ASSIGNMENTS OF ERROR

Petitioner assigns as error the following:

1. That the court erred in its findings of fact, as set forth in Exception 1 (R pp 15 to 20 and 74).

2. That the court erred in its conclusion of law, as set forth in Exception 2 (R pp 20 and 74).

3. That the court erred in signing the judgment as set forth in Exception 3 (R pp 15 to 22 and 74).

IN SUPERIOR COURT OF NORTHAMPTON COUNTY

STIPULATION RE RECORD ON APPEAL

It is hereby stipulated and agreed by and between attorneys for petitioner and attorneys for defendant that the

foregoing, including all other stipulations herein set forth, shall constitute the case on appeal.

This 14th day of January 1957.

Sylvester & Haimoff, Sanford, Phillips, McCoy & Weaver, By: Dickson Phillips, Attorneys for Petitioner.

Eric Norfleet, Gay & Midyette, by: Eric Norfleet, Attorneys for Defendant.

[fol. 76] IN THE SUPREME COURT OF NORTH CAROLINA

AIDA S. KOVACS

v.

GEORGE A. BREWER, SR.

OPINION—March 20, 1957

Appeal by petitioner from Stevens, J., at Chambers in Winton, North Carolina, 12 September 1956. From Northampton.

This is a proceeding brought pursuant to GS 50-13 to determine a dispute concerning the custody of the minor child of the parents who were divorced by a decree of the State of New York.

The order entered pursuant to the hearing in Winton, North Carolina, on 12 September 1956, was signed by consent of counsel at Halifax on 10 December 1956.

This matter was heard before his Honor Henry L. Stevens, Jr., Judge regularly assigned and holding courts of the Sixth Judicial District, at which time and place the petitioner was present and represented by counsel, and the respondent was present and represented by counsel. The minor child, who is the subject of this controversy, was also present, as was her father, George A. Brewer, Jr.

By direction of the court the matter was heard solely on affidavits, pleadings, certain stipulations and petitioner's exhibits, and upon consideration thereof the court found the facts as follows:

"1. That George A. Brewer, Jr., father of Jane Elizabeth Brewer, the minor child who is the subject of this controversy, enlisted in the U. S. Navy in 1946 and has been a member of such service since that date.

"2. That on April 18, 1945, the said George A. Brewer, [fol. 77] Jr. married Aida Speciale (now Aida Kovacs). On May 30, 1946, a child, Jane Elizabeth Brewer, was born to said marriage. That they lived together in the marital relation until some time in 1950. That on July 31, 1950, George A. Brewer, Jr. instituted an action for divorce against his wife on the grounds of adultery in the Supreme Court of the State of New York in and for the County of New York. That on January 17, 1951, said Court entered a decree of divorce in favor of George A. Brewer, Jr. against his said wife on the grounds of adultery with Joseph Kovacs, and awarded the custody of the child, Jane Elizabeth Brewer, to George A. Brewer, Sr., the father of George A. Brewer, Jr., and the grandfather of said child.

"3. That immediately after the rendition of the decree awarding custody of said child, the said Aida Brewer went into hiding, taking the child with her, and it was not until on or about September 6, 1951 that the said father or grandfather were able to find the child and her mother. They were found living with Joseph Kovacs at 21 James Avenue in Jersey City and in order to gain the physical custody of the said child, it was necessary for the parent and grandparent to obtain a writ of habeas corpus in the Superior Court Chancery Division of Jersey City. Upon a hearing on the return of said writ, physical possession and custody of said minor was granted to the father and grandfather of said child.

"4. That immediately thereafter, the said grandfather returned to his home in Gaston, Northampton County, North Carolina, bringing with him the said Jane Elizabeth Brewer. The domicile of the said George A. Brewer, Sr. is now and has been for more than twenty years, said Town of Gaston, Northampton County, North Carolina.

"5. That since said time the said Jane Elizabeth Brewer [fol. 78] has been continuously residing in the home of

her grandfather, George A. Brewer, Sr., in Gaston, Northampton County, North Carolina, and at no time has been out of the State of North Carolina.

"6. That immediately following the divorce decree on January 17, 1951, George A. Brewer, Jr. left the State of New York with the intention not to return, and has continuously resided since then in Gaston, North Carolina except for the times that he was on duty in the Navy; has voted in elections held in Gaston Precinct in 1952, 1954 and 1956; that since said time, and in the periods when he owned an automobile, such car has been registered in North Carolina with a North Carolina license plate and the same in the Town of Gaston; that since he left New York, he has paid his Federal income tax through the Greensboro, North Carolina office; that since he left New York, he has spent his leaves at his home in Gaston, North Carolina with his father, stepmother and child. That at all times since he left the State of New York, and now, George A. Brewer, Jr. has been and is a resident of and domiciled in Gaston, North Carolina.

"7. That George A. Brewer, Jr. is a Machinist Mate First Class in the U. S. Navy with a base pay of $258.00 per month, plus $77.10 for the maintenance of Jane Elizabeth Brewer. That he makes an allotment and pays monthly to his father the sum of $157.10 for the support and maintenance of Jane Elizabeth Brewer.

"8. That on October 2, 1951, and again on November 17, 1952, the petitioner made application in the Supreme Court of the State of New York for the modification of said divorce decree seeking custody of said child for the petitioner. Both applications were denied. That in July 1954, the petitioner married Joseph Kovacs, the person who was named as co-respondent in the divorce action hereinabove referred to, and the person whom the court found as the [fol. 79] co-respondent. That in November 1954, the petitioner again applied to said New York Court for a modification of the divorce decree seeking custody of the child for herself. That upon a hearing upon said petition, the court entered a decree awarding such custody. At said hearing, neither George A. Brewer, Sr. nor George A. Brewer, Jr.

appeared in person but did through counsel and each submitted affidavits which were considered by the court. The minor child, Jane Elizabeth Brewer, was not present in the State of New York at the time of said hearing, or at any time since her removal from said State in 1951. At the time of said hearing, and since 1951, she has been a resident of and domiciled in Gaston, North Carolina. That neither George A. Brewer, Sr. nor George A. Brewer, Jr. has been in the State of New York since 1951.

"9. That petitioner filed her petition in the present case in the Superior Court of Northampton County on the 24th day of February 1956, under the provisions of Section 50-13 of the General Statutes of North Carolina; summons was personally served on the defendant on February 29, 1956; the defendant filed answer on March 29, 1956.

"10. That George A. Brewer, Sr. is 64 years of age and for more than one year has not required any care for a coronary artery condition or for a diabetic condition. He is able to work, and properly supervise the maintenance and care of his granddaughter, Jane Elizabeth Brewer; that he is senior trustee of the Board of Stewards, teacher of the adult Bible Class of his church school and an active and reliable layman of his church. He is vitally interested in the public schools of his community and in consequence of such church and school interest and activity the environment of his home is suitable for the upbringing of a child; [fol. 80] that George A. Brewer, Sr. owns his residence. It is situated in the corporate limits of the Town of Gaston and located tastefully on a hill, is small, but adequate and neat. The home is attractive in appearance, comfortable and modest. It is complete with bath, hot and cold water, is heated with an oil heater floor furnace and has a gas heater in the fireplace which may be used as auxiliary heat in case of severe weather.

"That Mrs. George A. Brewer, Sr. is a graduate nurse of the Roanoke Rapids, N. C. Hospital, having graduated in 1927; that she is peculiarly qualified to give attention and care to said minor, Jane Elizabeth Brewer; that she has shown, and continues to show, affection and interest in said minor; that she is a teacher of small children in her

church school. She is a gentle, loving person, fully qualified in every way to give Jane Elizabeth Brewer motherly care and Christian nurture and training that she needs at this period of her life.

"11. That Jane Elizabeth Brewer was about 5½ years of age when her custody was awarded to her grandfather, George A. Brewer, Sr.; that she has lived continuously since that time with her grandfather and step-grandmother; that she has been a constant attendant at church services and at church school. In church school she has been awarded a pin for uninterrupted attendance for a period of more than five years; that she has been a constant attendant in the local elementary school where she has proven to be a bright and attractive child. She has done well in the scholastic work and has been one of the top-ranking pupils. In 1954, she voluntarily made a public confession of Christ and joined the church of her grandparents of her own free will.

"Said minor is provided with a swing, toys, dolls and doll house and a playhouse. She has many young friends with [fol. 81] whom she plays and visits. She has made and enjoys friends in the Town of Gaston not only among those of her age, but with adults also. Her health is good and she has had the doctor only twice since 1951, and that was for a minor upset stomach which lasted only a day. She has grown several inches in height and has gained in weight.

"She has advantages equal to those of any child in Gaston, good schools, supervised playground, recreational facilities, a good home and church training, and above all a sense of being loved and wanted.

"12. That in 1954, when the said New York decree was entered, there was residing in the home of George A. Brewer, Sr., himself, his wife and the son of Mrs. Brewer; that the son of Mrs. Brewer is no longer residing in said home, and it is now occupied only by Mr. and Mrs. George A. Brewer, Sr. and the said Jane Elizabeth Brewer. That the removal of the son of Mrs. George A. Brewer, Sr. provides more space in the home for the convenience and comfort of said child, and lessens the responsibility of the said Mr. and Mrs. George A. Brewer, Sr. in providing maintenance and supervision for said minor.

"13. That the petitioner, Aida Kovacs, is not a fit and proper person to have the care, custody and control of the minor, Jane Elizabeth Brewer.

"14. That George A. Brewer, Sr. is a man of excellent character, good habits and conduct, and is a fit and suitable person to have the care, custody and control of the minor, Jane Elizabeth Brewer.

"15. That the welfare, interest and development of the child will be materially promoted by allowing her to remain in the custody of George A. Brewer, Sr. and in the environment to which she has become accustomed and upon which in a measure she depends."

[fol. 82] The decree entered pursuant to the above findings, in pertinent part, is as follows:

"1. That this Court, in passing upon the care, custody and control of Jane Elizabeth Brewer, is not bound by or required to give effect to the decree of the Court of the State of New York made in 1954 and hereinbefore referred to.

"2. That the petitioner's petition to be awarded the care, custody and control of the said Jane Elizabeth Brewer is hereby denied.

"3. That the care, custody and control of the said Jane Elizabeth Brewer is hereby awarded to the respondent, George A. Brewer, Sr.

The petitioner appeals, assigning error.

Sylvester & Haimoff, of the New York Bar, Sanford, Phillips, McCoy & Weaver, for petitioner
Gay & Midyette, Eric Norfleet, for respondent

Denny, J. The appellant's first assignment of error is based on a single exception to the court's findings of fact numbered one through fifteen and does not point out wherein the findings of fact are not supported by the evidence. Therefore, the exception is broadside and this assignment of error presents nothing for review except whether or not the court's conclusions of law are supported by its findings. Winborne v. Stokes, 238 NC 414, 78 SE 2d 171; Burnsville v. Boone, 231 NC 577, 58 SE 2d 351.

The second assignment of error is based on an exception to his Honor's conclusion of law to the effect "that this court, in passing upon the care, custody and control of Jane Elizabeth Brewer, is not bound by nor required to give effect to the decree of the Court of the State of New York made in 1954, * * *."

Irrespective of the failure of the appellant to challenge [fol. 83] by proper exceptions the sufficiency of the evidence to support the court's findings in the hearing below, we are of the opinion that the findings are supported by competent evidence and that they support the court's conclusion of law challenged by the second assignment of error, and we so hold. Hoskins v. Currin, 242 NC 432, 88 SE 2d 228.

The respondent, George A. Brewer, Sr., having been found to be a citizen and resident of North Carolina, domiciled in said State, to whom the custody of Jane Elizabeth Brewer, then 5½ years of age, was awarded, by the New York Court on 17 January 1951; and the said minor child having been a resident in the home of her grandfather, George A. Brewer, Sr., since September 1951; and her father, George A. Brewer, Jr., having been domiciled in North Carolina since immediately after January 1951, we hold, in the light of these findings, that the courts of North Carolina have the power and authority to hear and determine the question of the custody and welfare of the minor child involved herein. Richter v. Harmon, 243 NC 373, 90 SE 2d 744; Hoskins v. Currin, supra; Gafford v. Phelps, 235 NC 218, 69 SE 2d 313; In re Biggers, 228 NC 743, 47 SE 2d 32; In re Ogden, 211 NC 100, 189 SE 119; In re Alderman, 157 NC 507; 73 SE 126, 39 LRA (NS) 988.

We further hold that the modification of the 1951 decree made by the New York Court in 1954, has no extra-territorial effect, and we are not bound by the full faith and credit clause of the Constitution of the United States, Article IV, section 1, to recognize and enforce the modified decree. In re Alderman, supra; In re Biggers, supra; Hoskins v. Currin, supra.

An action which relates to the custody of a child is in [fol. 84] the nature of an *in rem* proceeding. Therefore, the child is the *res* over which the court must have jurisdiction

before it may enter a valid and enforceable order. Weddington v. Weddington, 243 NC 702, 92 SE 2d 71; Richter v. Harmon, supra; Hoskins v. Currin, supra; Coble v. Coble, 229 NC 81, 47 SE 2d 798.

The court below has found that the petitioner, Aida Kovacs, is not a fit and proper person to have the care, custody and control of the minor, Jane Elizabeth Brewer; on the other hand, it has found that George A. Brewer, Sr. is a man of excellent character, good habits and conduct and is a fit and suitable person to have the care and custody of said minor child. The welfare of the child in controversies involving custody is the polar star by which the courts must be guided in awarding custody. Smith v. Smith, 241 NC 307, 84 SE 2d 891; Griffin v. Griffin, 237 NC 404, 75 SE 2d 133; Gafford v. Phelps, supra; Walker v. Walker, 224 NC 751, 32 SE 2d 318; Story v. Story, 221 NC 114, 19 SE 2d 136.

The judgment of the court below is affirmed.

Affirmed

[fol. 85] In Supreme Court of North Carolina

Spring Term, 1957

No. 168 Northampton County

Aida S. Kovacs

v.

George A. Brewer, Sr.

Judgment—March 20, 1957

This cause came on to be argued upon the transcript of the record from the Superior Court Northampton County: Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable Emery B. Denny Justice, be certified to the said

Superior Court, to the intent that the Judgment Is Affirmed. And it is considered and adjudged further, that the plaintiff and surety to the appeal bond U. S. Fidelity & Guaranty Co. do pay the costs of the appeal in this Court incurred, to wit, the sum of Thirty-three and 50/100 dollars ($33.50), and execution issue therefor.

A True Copy

Adrian J. Newton, Clerk of the Supreme Court.

[fol. 86] IN THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

AIDA S. KOVACS

v.

GEORGE A. BREWER, SR.

CLERK'S CERTIFICATE

Appeal docketed	29 January, 1957
Case argued	27 February, 1957
Opinion filed	20 March, 1957
Final Judgment entered	20 March, 1957

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record and the proceedings in the above entitled case, as the same now appear from the originals on file in my office.

I further certify that no petition to rehear has been filed, and that the time for filing such petition, under the rules of this Court, has expired.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this 15 June, 1957.

Adrian J. Newton, Clerk of the Supreme Court of the State of North Carolina.

[fol. 87] SUPREME COURT OF THE UNITED STATES
No. 200, October Term, 1957

[Title omitted]

ORDER ALLOWING CERTIORARI—October 14, 1957

The petition herein for a writ of certiorari to the Supreme Court of the State of North Carolina is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
JUN 13 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. ~~1098~~ 200

AIDA S. KOVACS,

Petitioner,

against

GEORGE A. BREWER, SR.,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

HARRIS B. STEINBERG
and
SYLVESTER & HAIMOFF,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1956

No.

AIDA S. KOVACS,

Petitioner,

against

GEORGE A. BREWER, SR.,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

The Petitioner, Aida S. Kovacs, prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina entered in the above entitled cause on March 20, 1957.

Opinions Below

The opinion of the Supreme Court of North Carolina, printed in Appendix A hereto, pages 19-27, is reported in 245 North Carolina 630.

Jurisdiction

The judgment of the Supreme Court of North Carolina was entered on March 20, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254.

Question Presented

Whether an order of the New York Supreme Court in a divorce action, modifying its former judgment in respect of custody, is binding upon the Courts of North Carolina, under Article IV, Section 1 of the United States Constitution, where the parties appeared in the New York proceeding, but the child resided in and was physically present in North Carolina at the time of modification.

Constitutional Provision and Statutes Involved

Article IV, Section 1, of the Constitution, provides:

> "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof."

Congress, by the Act of May 26, 1790, C. 11, as amended, R. S. Sec. 905, 28 U. S. C. Sec. 687, declared that judgments:

> "shall have such faith and credit given to them in every Court within the United States as they have by law or usage in the Courts of the State from which they are taken."

Statement

On April 18, 1945, the Petitioner was married to George A. Brewer, Jr., in the City of New York, where they then resided. They had one child, Jane Elizabeth Brewer, born on May 30, 1946, in New York.

On January 17, 1951, a judgment of divorce was rendered by the New York Supreme Court against the Petitioner on the ground of her adultery; and custody of the

child was awarded to the child's paternal grandparent, George A. Brewer, Sr., a resident of North Carolina, because the child's father, plaintiff in the divorce action, was then and still is in the United States Navy. In awarding custody of the child to the paternal grandfather, Mr. Justice Walter of the New York Supreme Court stated:

> "The question of the custody of the child remains. Even though I find defendant guilty of adultery, I would not, on that finding alone, take a four-year old girl from her mother if the mother's situation and surroundings were such as to promote the interest and well-being of the child. I think the best interests of the child require that she be placed in the custody of plaintiff's father (her paternal grandfather) and the plaintiff asks that be done at least until he is discharged from the Navy."

Thereafter, the Petitioner on October 2, 1951, and again on November 17, 1952, applied in the New York Supreme Court for an order modifying the decree to award her custody, relying upon intervening changes in her situation and surroundings, in both of which proceedings the Brewers appeared and submitted opposing affidavits. Both applications, however, were denied.

In July, 1954, the Petitioner married Joseph Kovacs, who was the co-respondent in the original divorce action and took up her residence with him in Riverdale, New York.

Relying upon her remarriage and the resulting material improvement in her circumstances, the Petitioner again applied in the New York Supreme Court on November 9, 1954, for a modification of the divorce decree to award her custody of the child. The Brewers again appeared in opposition, were represented by counsel and submitted answering affidavits and briefs.

This application was granted by Mr. Justice Brisach of the New York Supreme Court, who stated:

> "Previous applications to modify this decision have been denied, presumably on the ground that there has been no material change in defendant's situation and surroundings. Defendant, however, is now remarried and is now living in an apartment in a desirable residential community in Riverdale, New York. Her situation is presently such as to permit the bringing up of the child, who is now eight years of age, in proper surroundings. The papers disclose that the plaintiff has re-enlisted and is now serving in the Navy and intends to continue such service and the infant is now living with her paternal grandfather, who is admittedly a diabetic and suffers from coronary thrombosis. The accommodations and surroundings of the mother are acceptable for the welfare of the infant and would be more desirable for an eight year old girl, whose bringing up belongs to her mother."

The order of modification awarding custody of the child to the Petitioner was duly served upon the Brewers in North Carolina pursuant to the order of the New York Court, but the Brewers refused to surrender the child.

Thereupon, and on or about February 20, 1956, the Petitioner brought a proceeding in the Superior Court of North Carolina, under the provisions of Section 50-13 of the North Carolina General Statutes, which governs jurisdiction of controversies respecting the custody of children of parents divorced by courts of States other than North Carolina.

The petition in the North Carolina proceeding set forth the facts with respect to the marriage of the parties in New York; the birth of the child; the divorce proceeding and the award of custody to the paternal grandfather; the original applications which were denied; and then alleged the following with respect to the New York order of modification:

> "That after her remarriage, this petitioner once more, on November 9, 1954, applied to the afore-

said New York Court for a modification of the divorce decree to award custody of the child to her. That on December 23rd, 1954 this application was granted by order awarding custody of the child, Jane Elizabeth Brewer, to this petitioner. That the defendant herein, George A. Brewer, Sr., and his son, George A. Brewer, Jr., former spouse of this petitioner, and father of the child, appeared in the proceeding by counsel; submitted to jurisdiction of the said New York Court on the question of custody therein raised, and submitted affidavits in opposition to the granting of the order. A copy of said order is attached hereto and made a part hereof, marked Exhibit B."

The petition then declared that the Brewers wrongfully refused to relinquish custody and control of the child, and that the decree of the New York Court was entitled to full faith and credit in North Carolina, stating:

"That this petitioner is informed and believes and therefore alleges that the decree of the New York Court dated December 23, 1954, is entitled to full faith and credit in the courts of North Carolina except as to matters showing changed circumstances since the date of such decree. And petitioner expressly pleads said New York decree as entitling her to custody of said child by judgment of this Court, in the absence of a showing by defendant of such changed circumstances."

The Defendant, the paternal grandfather, by his answer, alleged that the child was not physically present in New York in December, 1954, when the New York order awarding custody to the Petitioner was made; that at the time of said order, the child's father resided in and was domiciled in the State of North Carolina; that the best interests of the child would be served by allowing her to remain in the custody of the grandparent; and that the Petitioner was not a fit person to have custody of the child.

No reference was made in the answer to any change of circumstances occurring since December 23, 1954, the date of the entry of the order of modification.

The case was heard on September 12, 1956, at Winton, North Carolina before Judge Henry L. Stevens, Jr. By direction of the Court, the matter was heard solely on affidavits, the pleadings, certain stipulations and the exhibits annexed to the petition.

At the hearing before Judge Stevens, the Petitioner relied solely upon the New York order. The Defendant in the North Carolina Court offered in evidence a series of affidavits designed to show that the Petitioner was not a suitable person to have custody of the child.

Thereafter, and on December 10, 1956, Judge Stevens rendered judgment denying the Petitioner's application for custody and deciding expressly that the North Carolina Court was "not bound by or required to give effect" to the New York decree. As to this, the Court stated:

> "That this Court, in passing upon the care, custody and control of Jane Elizabth Brewer, is not bound by or required to give effect to the decree of the Court of the State of New York made in 1954 and hereinbefore referred to."

The only finding of the Court relating to a circumstance occurring subsequent to the entry of the New York judgment related to the fact that in 1954, when the New York decree was entered, the son of Mrs. Brewer was living with the parties, whereas at the time of the North Carolina proceeding, he was no longer living with them. The Court stated:

> "That the removal of the son of Mrs. George A. Brewer, Sr. provides more space in the home for the convenience and comfort of said child, and lessens the responsibility of the said Mr. and Mrs. George A. Brewer, Sr. in providing maintenance and supervision for said minor."

An appeal to the Supreme Court of North Carolina was thereafter duly taken and was heard on or about March 5, 1957.

The North Carolina Supreme Court, affirming the decision of the Superior Court, held that it was not bound to give any effect to the New York decree. The Court stated:

> "We further hold that the modification of the 1951 decree made by the New York Court in 1954, has no extra-territorial effect, and we are not bound by the full faith and credit clause of the Constitution of the United States, Article IV, section 1, to recognize and enforce the modified decree. In re Alderman, supra; In re Biggers, supra; Hoskins v. Currin, supra.
>
> "An action which relates to the custody of a child is in the nature of an *in rem* proceeding. Therefore, the child is the *res* over which the court must have jurisdiction before it may enter a valid and enforceable order. Weddington v. Weddington, 243 N. C. 702, 92 S. E. 2d 71; Richter v. Harmon, supra; Hoskins v. Currin, supra; Coble v. Coble, 229 N. C. 81, 47 S. E. 2d 798."

POINT I

The North Carolina decision is in conflict with decisions of the United States Supreme Court.

The jurisdiction of the Court of any State to render a valid divorce decree affecting marital status, alimony and custody of children has never been questioned where husband and wife appeared or were served in the state (*May* v. *Anderson*, 345 U. S. 528). Jurisdiction *in personam* is essential where the decree purports to affect alimony or custody (*Estin* v. *Estin*, 334 U. S. 541; *May* v. *Anderson, supra*). But where there is personal jurisdiction of both parties, the power of the Court to dispose of all of the issues incident to the divorce proceedings,

including alimony and custody, has never been challenged (*Estin* v. *Estin, supra; May* v. *Anderson, supra*).

In respect of custody, the Supreme Court has equated "the jurisdictional requirements for a custody decree to those for an *in personam* judgment" (Mr. Justice Jackson, dissenting, in *May* v. *Anderson, supra*). The decisions which have had the effect of equating these jurisdictional requirements, all of which were ignored by the North Carolina Supreme Court, may be briefly reviewed.

In *Estin* v. *Estin*, 334 U. S. 541, an alimony decree rendered in favor of the wife in a New York separation suit was followed by a Nevada divorce obtained by the husband, without personal service of the wife, which purported to nullify the New York alimony order. Holding that this could not be accomplished without personal jurisdiction of the wife, the Court said, at page 548, 549:

> "The Nevada decree that is said to wipe out respondent's claim for alimony under the New York judgment is nothing less than an attempt by Nevada to restrain respondent from asserting her claim under that judgment. That is an attempt to exercise an *in personam* jurisdiction over a person not before the court. That may not be done. Since Nevada had no power to adjudicate respondent's rights in the New York judgment, New York need not give full faith and credit to that phase of Nevada's judgment. A judgment of a court having no jurisdiction to render it is not entitled to the full faith and credit which the Constitution and statute of the United States demand. *Hansberry* v. *Lee*, 311 U. S. 32, 40-41; *Williams* v. *North Carolina*, 325 U. S. 226, 229, and cases cited."

Similarly, in *Armstrong* v. *Armstrong*, 76 Sup. Ct. 629, 100 L. Ed. 460, the Court held that a Florida divorce, obtained on constructive service, which made no alimony award, could not preclude the wife, an Ohio resident, from obtaining an alimony award in Ohio, as an incident to her

divorce action in that State, though no divorce decree could be rendered in Ohio in view of the valid Florida divorce. In its opinion, the Court said, 100 L. Ed., at page 466:

> "It has been the constitutional rule in this country at least since Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565, decided in 1878, that non-residents cannot be subjected to personal judgments without such service or appearance. We held in Estin v. Estin, 334 U. S. 541, 92 L. ed. 1561, 68 S. Ct. 1213, 1 A. L. R. 2d 1412, that an alimony judgment was this kind of 'personal judgment.' "

In *May* v. *Anderson*, 345 U. S. 528, cited by the United States Supreme Court in the *Armstrong* case, *supra,* the Court "equated" the jurisdictional requirements of alimony cases to custody cases. There, the parties were married and lived in Wisconsin until they separated by consent in December, 1946, the wife taking the children to Ohio to consider "her future course". When she decided not to return to Wisconsin, the husband brought an action for divorce in Wisconsin seeking custody of the children, in which she was not personally served. The Wisconsin Court entered a divorce decree, awarding custody of the children to the husband. Armed with this decree, the husband obtained the children, bringing them back to Wisconsin.

Some years later, he brought them to Ohio for a visit with the mother, whereupon she refused to surrender them. The husband then brought a *habeas corpus* proceeding in Ohio. The Ohio Court directed the wife to surrender the children to the husband, holding the Wisconsin judgment binding under the full faith and credit clause.

The Supreme Court reversed, ruling that the original Wisconsin decree was not binding upon the wife because she had not been served with process in Wisconsin. The fact that the children were domiciled in Wisconsin and that the parties had stipulated that the domicile of both parents continued to be in Wisconsin, was held not sufficient

to require enforcement of the Wisconsin decree in the absence of personal service upon the wife. In its opinion, the Court said, per Mr. Justice Burton, at page 534:

> "In the instant case, we recognize that a mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony.
>
> "In the instant case, the Ohio courts gave weight to appellee's contention that the Wisconsin award of custody binds appellant because, at the time it was issued, her children had a technical domicile in Wisconsin, although they were neither resident nor present there. We find it unnecessary to determine the children's legal domicile, because, even if it be with their father, that does not give Wisconsin, certainly as against Ohio, the personal jurisdiction that it must have in order to deprive their mother of her personal right to their immediate possession."

The Court accordingly held that Wisconsin was without jurisdiction to make a custody award, not because the children were in Ohio, but because the wife was.

Thus, the jurisdictional requirement of personal service upon, or an appearance by, the non-resident spouse, established in the alimony cases (*Estin* v. *Estin*, 334 U. S. 541) has expressly been made applicable to custody cases (*May* v. *Anderson, supra*); and as recently as April 1956, the Supreme Court cited *May* v. *Anderson*, a custody case, in dealing with an alimony award (*Armstrong* v. *Armstrong, supra*). Thus, as was pointed out by Mr. Justice Jackson in his dissenting opinion in *May* v. *Anderson*, the Supreme Court has "equated" the jurisdictional requirements of alimony and custody cases, stating (345 U. S. at page 540):

> "In spite of the fact that judges and law writers long have recognized the similarity between the jurisdictional requirements for divorce and for custody, this decision appears to equate the jurisdictional requirements for a custody decree to those for an *in personam* money judgment."

This is not to suggest that the presence of the child in North Carolina is without jurisdictional significance. A North Carolina court, acting in its capacity as *parens patriae*, may intervene in the interests of the child upon the basis of changed circumstances since the New York decree. This is a parallel and independent basis of jurisdiction, apart from the custody jurisdiction incidental to a divorce proceeding (*Finlay* v. *Finlay*, 240 N. Y. 249). The physical presence of the child within the state serves as the origin of this type of jurisdiction, which is founded upon the power of a state to regulate the custody of infants found within its territory. It has no relation to custody awards in divorce proceedings. In *Finlay* v. *Finlay, supra*, the Court said, per Cardozo, J., at pages 431, 432:

> "The jurisdiction of a State to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless (*Woodworth* v. *Spring*, 4 Allen, 321, 323; *White* v. *White*, 77 N. H. 26; *Hanrahan* v. *Sears*, 72 N. H. 71, 72; *Matter of Hubbard*, 82 N. Y. 90, 93). For this, the residence of the child suffices though the domicile be elsewhere (*Matter of Hubbard, supra*). But the limits of the jurisdiction are suggested by its origin. The residence of the child may not be used as a pretense for the adjudication of the status of parents whose domicile is elsewhere, nor for the definition of parental rights dependent upon status (cf. *Kline* v. *Kline*, 57 Ia. 386; *Griffin* v. *Griffin*, 93 Oreg. 78; *Lanning* v. *Gregory*, 100 Tex. 310; *Blackinton* v. *Blackinton*, 141 Mass. 432, 436; *Matter of Standish*, 197 App. Div. 176). Parents so situated must settle their controversies at home. Our courts will hold aloof when intervention is unnecessary for the welfare of the child.
>
> "We think the welfare of children does not appear from the complaint to be the basis of the husband's prayer for an apportionment of parental rights, nor is an action between contending spouses the proper form of remedy.

> "One situation there is, indeed, in which such an inquiry will be pursued in connection with an action between the spouses, or as a supplement thereto. The statute permits a judgment fixing the custody of children as an incident to a judgment for divorce or separation."

Residence of the child suffices as a ground of jurisdiction where intervention is necessary for the child's protection. It is not material where the parental rights of custody are to be adjudicated as incident to a divorce action.

The jurisdiction which may be exercised by the Court in the face of a prior foreign-custody award was described in *Halvey* v. *Halvey*, 330 U. S. 610. There, the parties having been married in New York, the wife took their child to Florida, established her residence there and obtained a decree of divorce which awarded her custody of the child. The day before the Florida decree was entered, the husband took the child back to New York without the wife's knowledge. Thereupon, the wife instituted habeas corpus proceedings in New York, seeking to enforce the Florida decree awarding her custody. The United States Supreme Court held that the New York Court had the same power to modify the custody decree as the Florida court would have had on the basis of proof not previously considered. In defining the proper scope of the jurisdiction exercisable by the New York Court under the full faith and credit clause, the Court said, per Mr. Justice Douglas, at page 613:

> "Facts which have arisen since the original decree are one basis for modification of the custody decree. *Frazier* v. *Frazier*, 109 Fla., p. 168, 147 So., p. 465; *Jones* v. *Jones*, 156 Fla. 524, 527, 23 So. 2d 623, 625. But the power is not so restricted. It was held in *Meadows* v. *Meadows*, 78 Fla. 576, 83 So. 392-393, that 'the proper custody of the minor child is a proper subject for consideration by the chancellor at any time, even if facts in issue could have been considered at a previous hearing, *if such facts were not* presented or considered at a former hearing'."

This, the Court held, constituted compliance with the full faith and credit clause, stating (p. 614):

> "So far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York may do. * * * But a judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered."

This does not mean that the issues tried in New York may be relitigated in North Carolina. The policy of the full faith and credit clause is the restriction of repetitive litigation. In *Halvey* v. *Halvey, supra*, Mr. Justice Frankfurter stated (p. 616):

> "The constitutional policy formulated by the Full Faith and Credit Clause cannot be fitted into tight little categories or too abstract generalities. That policy was the nation-wide restriction of litigiousness, to the extent that States, autonomous for certain purposes, should not be exploited to permit repetitive litigation. In substance, the Framers deemed it against the national welfare for a controversy that was truly litigated in one State to be relitigated in another. Such limitation does not foreclose inquiry into what was litigated and what was adjudicated. The scope of the Full Faith and Credit Clause is bounded by its underlying policy and not by procedural considerations unrelated to it."

In applying this constitutional prohibition against duplicate litigation in custody matters, Mr. Justice Frankfurter stated (617):

> "The child's welfare must be the controlling consideration whenever a court which can actually lay hold of a child is appealed to on behalf of the child. Short of that, a valid custodial decree by Florida could not be set aside simply because a New York court, on independent consideration, has its own view of what custody would be appropriate."

It is respectfully submitted that the decision of the North Carolina Court has, in effect, set aside the New York order merely because the North Carolina Court "on independent consideration (had) its own view of what custody would be appropriate." No reference was made in the decision of the North Carolina Supreme Court to any intervening change of circumstances warranting a reversal of the New York decree awarding custody to the wife. The fact that a stepson of Brewer, Sr., had moved out was not referred to by the Supreme Court.

On the contrary, both the Superior Court and the Supreme Court (*supra*, pp. 6, 7) stated that they were not required to give any effect to the New York judgment. This is a palpable violation of the Full Faith and Credit Clause.

The question as to the effect upon jurisdiction of the absence of the child from the forum state was expressly reserved in *Halvey* v. *Halvey, supra*, where the husband had "abducted" the child to New York the day before the Florida decree was entered.

The Supreme Court stated at pages 615, 616:

> "The narrow ground on which we rest the decision makes it unnecessary for us to consider several other questions argued, *e.g.*, whether Florida at the time of the original decree had jurisdiction over the child, the father having removed him from the State after the proceedings started but before the decree was entered; * * * whether the State which has jurisdiction over the child may, regardless of a custody decree rendered by another State, make such orders concerning custody as the welfare of the child from time to time requires. On all these problems we reserve decision."

It is respectfully submitted that there is no justification, in principle, for a requirement of the physical presence or domicile of the child where the Court has jurisdiction of the parents in a divorce proceeding. Jurisdiction

basically is a matter of due process, involving essentially notice and hearing (*Pennoyer* v. *Neff*, 95 U. S. 714; *Williams* v. *North Carolina*, 317 U. S. 287).

The child clearly has no right or need for notice or hearing, where his guardians are before the Court.

It is accordingly respectfully submitted that the decision of the North Carolina Supreme Court violates the Full Faith and Credit Clause of the United States Constitution.

POINT II

The question of the jurisdiction of the New York court is *res adjudicata*.

Moreover, the question of the jurisdiction of the New York Court was not open to defendant in the North Carolina proceeding. The Brewers participated in the New York proceeding and had full opportunity to contest that Court's jurisdiction. Having failed to do so they are precluded by the New York determination (*Sherrer* v. *Sherrer*, 334 U. S. 343, 351; *Johnson* v. *Muelberger*, 340 U. S. 581; *Cook* v. *Cook*, 342 U. S. 126; *Davis* v. *Davis*, 305 U. S. 32). Defendant's neglect in New York is not the basis for attacking the New York decree in North Carolina. In *Sherrer* v. *Sherrer*, *supra*, the Court said at page 352:

> "If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own. We do not believe that the dereliction of a defendant under such circumstances should be permitted to provide a basis for subsequent attack in the courts of a sister State on a decree valid in the State in which it was rendered."

The Court pointed out that the doctrine of *res judicata* applies to adjudications relating either to jurisdiction of

the person or of the subject matter where the parties were given full opportunity to litigate. The Court said at page 350:

> "Insofar as cases originating in the federal courts are concerned, the rule has evolved that the doctrine of *res judicata* applies to adjudications relating either to jurisdiction of the person or of the subject matter where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate."

Applying this general principle to cases arising under the full faith and credit clause, the Court said at pages 351, 352:

> "We believe that the decision of this Court in the *Davis* case and those in related situations are clearly indicative of the result to be reached here. Those cases stand for the proposition that the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree."

In *Johnson* v. *Muelberger*, 340 U. S. 581, the Court quoted the following principle from *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 78 (340 U. S. p. 585):

> " 'One trial of an issue is enough. "The principle of *res judicata* apply to questions of jurisdiction as well as to other issues," as well to jurisdiction of the subject matter as of the parties.' "

POINT III

The validity of the New York judgment, under New York law, has not been challenged.

There is no doubt that the modification of the custody award is valid in New York, despite the absence of the child at the time of the modification (*May* v. *May*, 233 N. Y. App. Div. 519 (1st Dept.); *People* v. *Winton*, 34 Misc. 21 aff'd 61 App. Div. 615; *Grenier* v. *Grenier*, 175 Misc. 406; and see *Langerman* v. *Langerman*, 303 N. Y. 465; *Ansorge* v. *Armour*, 267 N. Y. 492, 498).

In *May* v. *May*, *supra*, the Court said, at page 520:

> "It is true that where both parties are before the court, custody of a child or children without the jurisdiction may be made."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HARRIS B. STEINBERG
and
SYLVESTER & HAIMOFF,
Attorneys for Petitioner.

Dated, June 13, 1957

Appendix A

(Opinion of Supreme Court of North Carolina)

IN THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM—1957

No. 168—Northampton

—o—

AIDA S. KOVACS

—v.—

GEORGE A. BREWER, SR.

—o—

Appeal by petitioner from Stevens, J., at Chambers in Winton, North Carolina, 12 September 1956. From Northampton.

This is a proceeding brought pursuant to GS 50-13 to determine a dispute concerning the custody of the minor child of the parents who were divorced by a decree of the State of New York.

The order entered pursuant to the hearing in Winton, North Carolina, on 12 September 1956, was signed by consent of counsel at Halifax on 10 December 1956.

This matter was heard before his Honor Henry L. Stevens, Jr., Judge regularly assigned and holding courts of the Sixth Judicial District, at which time and place the petitioner was present and represented by counsel, and the respondent was present and represented by counsel. The minor child, who is the subject of this controversy, was also present, as was her father, George A. Brewer, Jr.

By direction of the court the matter was heard solely on affidavits, pleadings, certain stipulations and petitioner's exhibits, and upon consideration thereof the court found the facts as follows:

"1. That George A. Brewer, Jr., father of Jane Elizabeth Brewer, the minor child who is the subject of this controversy, enlisted in the U. S. Navy in 1946 and has been a member of such service since that date.

"2. That on April 18, 1945, the said George A. Brewer, Jr. married Aida Speciale (now Aida Kovacs). On May 30, 1946, a child, Jane Elizabeth Brewer, was born to said marriage. That they lived together in the marital relation until some time in 1950. That on July 31, 1950, George A. Brewer, Jr. instituted an action for divorce against his wife on the grounds of adultery in the Supreme Court of the State of New York in and for the County of New York. That on January 17, 1951, said Court entered a decree of divorce in favor of George A. Brewer, Jr. against his said wife on the grounds of adultery with Joseph Kovacs, and awarded the custody of the child, Jane Elizabeth Brewer, to George A. Brewer, Sr., the father of George A. Brewer, Jr., and the grandfather of said child.

"3. That immediately after rendition of the decree awarding custody of said child, the said Aida Brewer went into hiding, taking the child with her, and it was not until on or about September 6, 1951 that said father or grandfather were able to find the child and her mother. They were found living with Joseph Kovacs at 21 James Avenue in Jersey City and in order to gain the physical custody of the said child, it was necessary for the parent and grandparent to obtain a writ of habeas corpus in the

Superior Court Chancery Division of Jersey City. Upon a hearing on the return of said writ, physical possession and custody of said minor was granted to the father and grandfather of said child.

"4. That immediately thereafter, the said grandfather returned to his home in Gaston, Northampton County, North Carolina, bringing with him the said Jane Elizabeth Brewer. The domicile of the said George A. Brewer, Sr. is now and has been for more than twenty years, said Town of Gaston, Northampton County, North Carolina.

"5. That since said time the said Jane Elizabeth Brewer has been continuously residing in the home of her grandfather, George A. Brewer, Sr., in Gaston, Northampton County, North Carolina, and at no time has been out of the State of North Carolina.

"6. That immediately following the divorce decree on January 17, 1951, George A. Brewer, Jr. left the State of New York with the intention not to return, and has continuously resided since then in Gaston, North Carolina except for the times that he was on duty in the Navy; has voted in elections held in Gaston Precinct in 1952, 1954 and 1956; that since said time; and in the periods when he owned an automobile, such car has been registered in North Carolina with a North Carolina license plate and the same in the Town of Gaston; that since he left New York, he has paid his Federal income tax through the Greensboro, North Carolina office; that since he left New York, he has spent his leaves at his home in Gaston, North Carolina with his father, stepmother and child. That at all times since he left the State of New York, and now, George A. Brewer, Jr., has been and is a resident of and domiciled in Gaston, North Carolina.

"7. That George A. Brewer, Jr. is a Machinist Mate First Class in the U. S. Navy with a base pay of $258.00 per month, plus $77.10 for the maintenance of Jane Elizabeth Brewer. That he makes an allotment and pays monthly to his father the sum of $157.10 for the support and maintenance of Jane Elizabeth Brewer.

"8. That on October 2, 1951, and again on November 17, 1952, the petitioner made application in the Supreme Court of the State of New York for the modification of said divorce decree seeking custody of said child for the petitioner. Both applications were denied. That in July 1954, the petitioner married Joseph Kovacs, the person who was named as co-respondent in the divorce action hereinabove referred to, and the person whom the court found as the co-respondent. That in November 1954, the petitioner again applied to said New York Court for a modification of the divorce decree seeking custody of the child for herself. That upon a hearing upon said petition, the court entered a decree awarding such custody. At said hearing, neither George A. Brewer, Sr. nor George A. Brewer, Jr. appeared in person but did through counsel and each submitted affidavits which were considered by the court. The minor child, Jane Elizabeth Brewer, was not present in the State of New York at the time of said hearing, or at any time since her removal from said State in 1951. At the time of said hearing, and since 1951, she has been a resident of and domiciled in Gaston, North Carolina. That neither George A. Brewer, Sr. nor George A. Brewer, Jr. has been in the State of New York since 1951.

"9. That petitioner filed her petition in the present case in the Superior Court of Northampton County on the 24th day of February 1956, under the

provisions of Section 50-13 of the General Statutes of North Carolina; summons was personally served on the defendant on February 29, 1956; the defendant filed answer on March 29, 1956.

"10. That George A. Brewer, Sr. is 64 years of age and for more than one year has not required any care for a coronary artery condition or for a diabetic condition. He is able to work, and properly supervise the maintenance and care of his granddaughter, Jane Elizabeth Brewer; that he is senior trustee of the Board of Stewards, teacher of the adult Bible Class of his church school and an active and reliable layman of his church. He is vitally interested in the public schools of his community and in consequence of such church and school interest and activity the environment of his home is suitable for the upbringing of a child; that George A. Brewer, Sr. owns his residence. It is situated in the corporate limits of the Town of Gaston and located tastefully on a hill, is small, but adequate and neat. The home is attractive in appearance, comfortable and modest. It is complete with bath, hot and cold water, is heated with an oil heater floor furnace and has a gas heater in the fireplace which may be used as auxiliary heat in case of severe weather.

"That Mrs. George A. Brewer, Sr. is a graduate nurse of the Roanoke Rapids, N. C. Hospital, having graduated in 1927; that she is peculiarly qualified to give attention and care to said minor, Jane Elizabeth Brewer; that she has shown, and continues to show, affection and interest in said minor; that she is a teacher of small children in her church school. She is a gentle, loving person, fully qualified in every way to give Jane Elizabeth Brewer motherly care and Christian nurture and training that she needs at this period of her life.

"11. That Jane Elizabeth Brewer was about 5½ years of age when her custody was awarded to her grandfather, George A. Brewer, Sr.; that she has lived continuously since that time with her grandfather and step-grandmother; that she has been a constant attendant at church services and at church school. In church school she has been awarded a pin for uninterrupted attendance for a period of more than five years; that she has been a constant attendant in the local elementary school where she has proven to be a bright and attractive child. She has done well in the scholastic work and has been one of the top-ranking pupils. In 1954, she voluntarily made a public confession of Christ and joined the church of her grandparents of her own free will.

"Said minor is provided with a swing, toys, dolls and doll house and a playhouse. She has many young friends with whom she plays and visits. She has made and enjoys friends in the Town of Gaston not only among those of her age, but with adults also. Her health is good and she has had the doctor only twice since 1951, and that was for a minor upset stomach which lasted only a day. She has grown several inches in height and has gained in weight.

"She has advantages equal to those of any child in Gaston, good schools, supervised playground, recreational facilities, a good home and church training, and above all a sense of being loved and wanted.

"12. That in 1954, when the said New York decree was entered, there was residing in the home of George A. Brewer, Sr., himself, his wife and the son of Mrs. Brewer; that the son of Mrs. Brewer is no longer residing in said home, and it is now occupied only by Mr. and Mrs. George A. Brewer, Sr. and the said Jane Elizabeth Brewer. That the

removal of the son of Mrs. George A. Brewer, Sr. provides more space in the home for the convenience and comfort of said child, and lessens the responsibility of the said Mr. and Mrs. George A. Brewer, Sr. in providing maintenance and supervision for said minor.

"13. That the petitioner, Aida Kovacs, is not a fit and proper person to have the care, custody and control of the minor, Jane Elizabeth Brewer.

"14. That George A. Brewer, Sr. is a man of excellent character, good habits and conduct, and is a fit and suitable person to have the care, custody and control of the minor, Jane Elizabeth Brewer.

"15. That the welfare, interest and development of the child will be materially promoted by allowing her to remain in the custody of George A. Brewer, Sr. and in the environment to which she has become accustomed and upon which in a measure she depends."

The decree entered pursuant to the above findings, in pertinent part, is as follows:

"1. That this Court, in passing upon the care, custody and control of Jane Elizabeth Brewer, is not bound by or required to give effect to the decree of the Court of the State of New York made in 1954 and hereinbefore referred to.

"2. That the petitioner's petition to be awarded the care, custody and control of the said Jane Elizabeth Brewer is hereby denied.

"3. That the care, custody and control of the said Jane Elizabeth Brewer is hereby awarded to the respondent, George A. Brewer, Sr."

The petitioner appeals, assigning error.

SYLVESTER & HAIMOFF, of the New York Bar, SANFORD, PHILLIPS, MCCOY & WEAVER, for petitioner;

GAY & MIDYETTE, ERIC NORFLEET, for respondent.

DENNY, *J.* The appellant's first assignment of error is based on a single exception to the court's findings of fact numbered one through fifteen and does not point out wherein the findings of fact are not supported by the evidence. Therefore, the exception is broadside and this assignment of error presents nothing for review except whether or not the court's conclusions of law are supported by its findings. Winborne v. Stokes, 238 N. C. 414, 78 S. E. 2d 171; Burnsville v. Boone, 231 N. C. 577, 58 S. E. 2d 351.

The second assignment of error is based on an exception to his Honor's conclusion of law to the effect "that this court, in passing upon the care, custody and control of Jane Elizabeth Brewer, is not bound by nor required to give effect to the decree of the Court of the State of New York made in 1954, * * *."

Irrespective of the failure of the appellant to challenge by proper exceptions the sufficiency of the evidence to support the court's findings in the hearing below, we are of the opinion that the findings are supported by competent evidence and that they support the court's conclusion of law challenged by the second assignment of error, and we so hold. Hoskins v. Currin, 242 N. C. 432, 88 S. E. 2d 228.

The respondent, George A. Brewer, Sr., having been found to be a citizen and resident of North Carolina, domiciled in said State, to whom the custody of Jane Elizabeth Brewer, then 5½ years of age, was awarded, by the New York Court on 17 January 1951; and the said minor child having been a resident in the home of her grandfather, George A. Brewer, Sr., since September 1951; and her father, George A. Brewer, Jr., having been domiciled in North Carolina since immediately after January 1951, we

hold, in the light of these findings, that the courts of North Carolina have the power and authority to hear and determine the question of the custody and welfare of the minor child involved herein. Richter v. Harmon, 243 N. C. 373, 90 S. E. 2d 744; Hoskins v. Currin, supra; Gafford v. Phelps, 235 N. C. 218, 69 S. E. 2d 313; In re Biggers, 228 N. C. 743, 47 S. E. 2d 32; In re Ogden, 211 N. C. 100, 189 S. E. 119; In re Alderman, 157 N. C. 507, 73 S. E. 126, 39 L. R. A. (N. S.) 988.

We further hold that the modification of the 1951 decree made by the New York Court in 1954, has no extra-territorial effect, and we are not bound by the full faith and credit clause of the Constitution of the United States, Article IV, section 1, to recognize and enforce the modified decree. In re Alderman, supra; In re Biggers, supra; Hoskins v. Currin, supra.

An action which relates to the custody of a child is in the nature of an *in rem* proceeding. Therefore, the child is the *res* over which the court must have jurisdiction before it may enter a valid and enforceable order. Weddington v. Weddington, 243 N. C. 702, 92 S. E. 2d 71; Richter v. Harmon, supra; Hoskins v. Currin, supra; Coble v. Coble, 229 N. C. 81, 47 S. E. 2d 798.

The court below has found that the petitioner, Aida Kovacs, is not a fit and proper person to have the care, custody and control of the minor, Jane Elizabeth Brewer; on the other hand, it has found that George A. Brewer, Sr. is a man of excellent character, good habits and conduct and is a fit and suitable person to have the care and custody of said minor child. The welfare of the child in controversies involving custody is the polar star by which the courts must be guided in awarding custody. Smith v. Smith, 241 N. C. 307, 84 S. E. 2d 891; Griffin v. Griffin, 237 N. C. 404, 75 S. E. 2d 133; Gafford v. Phelps, supra; Walker v. Walker, 224 N. C. 751, 32 S. E. 2d 318; Story v. Story, 221 N. C. 114, 19 S. E. 2d 136.

The judgment of the court below is affirmed.

APPELLANT'S BRIEF

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IN THE

Supreme Court of the United States

October Term, 1957

No. 200

AIDA S. KOVACS,

Appellant,

against

GEORGE A. BREWER, SR.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

APPELLANT'S BRIEF

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IN THE

Supreme Court of the United States

October Term, 1957

No. 200

AIDA S. KOVACS,

Appellant,

against

GEORGE A. BREWER, SR.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

APPELLANT'S BRIEF

Statement

Appellant appeals from a judgment of the Supreme Court of North Carolina, entered on March 20, 1957.

Opinion Below

The opinion of the Supreme Court of North Carolina, printed in Appendix A hereto, pages 27-85, is reported in 245 North Carolina 630.

Jurisdiction

The judgment of the Supreme Court of North Carolina was entered on March 20, 1957 (R. 73). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254. This Court granted certiorari on October 14, 1957 (R. 75).

Question Presented

Whether an order of the New York Supreme Court in a divorce action, modifying its former judgment in respect of custody, is binding upon the Courts of North Carolina, under Article IV, Section 1 of the United States Constitution, where the parties appeared in the New York proceeding, but the child resided in and was physically present in North Carolina at the time of modification.

Constitutional Provision and Statutes Involved

Article IV, Section 1, of the Constitution, provides:

> "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, record and proceedings shall be proved and the effect thereof."

Congress, by the Act of May 26, 1790, C. 11, as amended, R. S. Sec. 905, 28 U. S. C. Sec. 687, declared that judgments:

> "shall have such faith and credit given to them in every Court within the United States as they have by law or usage in the Courts of the State from which they are taken."

Summary of Argument

The Supreme Court of North Carolina held that the New York order was not entitled to full faith and credit in North Carolina on the ground that an action relating to custody is an *in rem* proceeding; that the child is the *res;* and that therefore the New York Courts had no jurisdiction since the child was in North Carolina at the time the New York order was made.

It is the contention of appellant that where there is personal jurisdiction of the parties in a divorce proceeding, the power of the Court to make orders respecting the marital status, alimony and custody cannot be challenged (*Estin* v. *Estin,* 334 U. S. 541; *May* v. *Anderson,* 345 U. S. 528). The presence of the child is not a jurisdictional prerequisite where the parties are before the Court in such a proceeding. This is so despite the fact that the presence of the child in North Carolina is a basis for the exercise of independent jurisdiction by the North Carolina Court acting in the interest of the child upon the basis of changed circumstances since the New York decree (*Halvey* v. *Halvey,* 330 U. S. 610; *Finlay* v. *Finlay,* 240 N. Y. 249). There is no suggestion in the opinions of the Courts below that the decisions made were influenced in any degree by any change in circumstances.

In any event, respondent, having appeared in the New York suit and submitted affidavits in opposition to the motion for a change of custody, had ample opportunity to contest the jurisdiction of the New York Court. Having failed to challenge the jurisdiction, respondent is now precluded from raising that question (*Sherrer* v. *Sherrer,* 334 U. S. 343, 351; *Johnson* v. *Muelberger,* 340 U. S. 581).

Statement of Facts

On April 18, 1945, the appellant was married to George A. Brewer, Jr., in the City of New York, where they then resided (R. 13). They had one child, Jane Elizabeth Brewer, born on May 30, 1946, in New York (R. 13-14).

On January 17, 1951, a judgment of divorce was rendered by the New York Supreme Court against the appellant on the ground of her adultery (R. 7-8); and custody of the child was awarded to the child's paternal grandparent, George A. Brewer, Sr., a resident of North Carolina, because the child's father, plaintiff in the divorce action, was then and still is in the United States Navy (R. 8, 14). In awarding custody of the child to the paternal grandfather, Mr. Justice Walter of the New York Supreme Court stated (R. 46):

> "The question of the custody of the child remains. Even though I find defendant guilty of adultery, I would not, on that finding alone, take a four-year old girl from her mother if the mother's situation and surroundings were such as to promote the interest and well-being of the child. I think the best interests of the child require that she be placed in the custody of plaintiff's father (her paternal grandfather) and the plaintiff asks that be done at least until he is discharged from the Navy."

Thereafter, the appellant on October 2, 1951, and again on November 17, 1952, applied in the New York Supreme Court for an order modifying the decree to award her custody. Both applications, however, were denied (R. 15).

In July, 1954, the Petitioner married Joseph Kovacs, who was the co-respondent in the original divorce action (R. 15) and took up her residence with him in Riverdale, New York (R. 46).

Relying upon her remarriage and the resulting material improvement in her circumstances, the appellant again

applied in the New York Supreme Court on November 9, 1954, for a modification of the divorce decree to award her custody of the child (R. 15). The Brewers appeared in opposition, were represented by counsel and submitted answering affidavits (R. 9, 15).

This application was granted by Mr. Justice Brisach of the New York Supreme Court, who stated (R. 46):

> "Previous applications to modify this decision have been denied, presumably on the ground that there has been no material change in defendant's situation and surroundings. Defendant, however, is now remarried and is now living in an apartment in a desirable residential community in Riverdale, New York. Her situation is presently such as to permit the bringing up of the child, who is now eight years of age, in proper surroundings. The papers disclose that the plaintiff has re-enlisted and is now serving in the Navy and intends to continue such service and the infant is now living with her paternal grandfather, who is admittedly a diabetic and suffers from coronary thrombosis. The accommodations and surroundings of the mother are acceptable for the welfare of the infant and would be more desirable for an eight year old girl, whose bringing up belongs to her mother."

It was stipulated below that the Brewers refused to surrender the child, as directed by the New York decree (R. 21).

Thereupon, and on or about February 20, 1956, the appellant brought a proceeding in the Superior Court of North Carolina, under the provisions of Section 50-13 of the North Carolina General Statutes, which governs jurisdiction of controversies respecting the custody of children of parents divorced by courts of States other than North Carolina (R. 16).

The petition in the North Carolina proceeding set forth the facts with respect to the marriage of the parties in New York; the birth of the child; the divorce proceeding

and the award of custody to the paternal grandfather; the original applications which were denied (R. 2-3); and then alleged the following with respect to the New York order of modification (R. 3):

> "That after her remarriage, this petitioner once more, on November 9, 1954, applied to the aforesaid New York Court for a modification of the divorce decree to award custody of the child to her. That on December 23rd, 1954 this application was granted by order awarding custody of the child, Jane Elizabeth Brewer, to this petitioner. That the defendant herein, George A. Brewer, Sr., and his son George A. Brewer, Jr., former spouse of this petitioner, and father of the child, appeared in the proceeding by counsel; submitted to jurisdiction of the said New York Court on the question of custody therein raised, and submitted affidavits in opposition to the granting of the order. A copy of said order is attached hereto and made a part hereof, marked Exhibit B."

The petition then declared that the Brewers wrongfully refused to relinquish custody and control of the child, and that the decree of the New York Court was entitled to full faith and credit in North Carolina, stating (R. 3-4):

> "That this petitioner is informed and believes and therefore alleges that the decree of the New York Court dated December 23, 1954, is entitled to full faith and credit in the courts of North Carolina except as to matters showing changed circumstances since the date of such decree. And petitioner expressly pleads said New York decree as entitling her to custody of said child by judgment of this Court, in the absence of a showing by defendant of such changed circumstances."

The respondent, the paternal grandfather, by his answer, alleged that the child was not physically present in New York in December, 1954, when the New York order awarding custody to the appellant was made; that at the time of said order, the child's father resided in and was domiciled in the State of North Carolina; that the best

interests of the child would be served by allowing her to remain in the custody of the grandparent; and that the appellant was not a fit person to have custody of the child (R. 12-13).

No reference was made in the answer to any change of circumstances occurring since December 23, 1954, the date of the entry of the order of modification (R. 10-13)

The case was heard on September 12, 1956, at Winton, North Carolina before Judge Henry L. Stevens, Jr. By direction of the Court, the matter was heard solely on affidavits, the pleadings, certain stipulations and the exhibits annexed to the petition (R. 13).

At the hearing before Judge Stevens the appellant relied solely upon the New York order (R. 20). The respondent in the North Carolina Court offered in evidence a series of affidavits designed to show that the appellant was not a suitable person to have custody of the child (R. 47-63).

Thereafter, and on December 10, 1956, Judge Stevens rendered judgment denying the appellant's application for custody and deciding expressly that the North Carolina Court was "not bound by or required to give effect to the New York decree." As to this, the Court stated (R. 18):

> "That this Court, in passing upon the care, custody and control of Jane Elizabeth Brewer, is not bound by or required to give effect to the decree of the Court of the State of New York made in 1954 and hereinbefore referred to."

The only finding of the Court relating to a circumstance occurring subsequent to the entry of the New York judgment related to the fact that in 1954, when the New York decree was entered, the son of Mrs. Brewer was living with the parties, whereas at the time of the North Carolina

proceeding, he was no longer living with them. The Court stated (R. 17):

> "That the removal of the son of Mrs. George A. Brewer, Sr. provides more space in the home for the convenience and comfort of said child, and lessens the responsibility of the said Mr. and Mrs. George A. Brewer, Sr. in providing maintenance and supervision for said minor."

An appeal to the Supreme Court of North Carolina was thereafter duly taken and was heard on or about February 27, 1957 (R. 74).

The North Carolina Supreme Court, affirming the decision of the Superior Court, held that it was not bound to give any effect to the New York decree. The Court stated (R. 72-73):

> "We further hold that the modification of the 1951 decree made by the New York Court in 1954, has no extra-territorial effect, and we are not bound by the full faith and credit clause of the Constitution of the United States, Article IV, section 1, to recognize and enforce the modified decree. In re Alderman, supra; In re Biggers, supra; Hoskins v. Currin, supra.
>
> "An action which relates to the custody of a child is in the nature of an *in rem* proceeding. Therefore, the child is the *res* over which the court must have jurisdiction before it may enter a valid and enforceable order. Weddington v. Weddington, 243 N. C. 702, 92 S. E. 2d 71; Richter v. Harmon, supra; Hoskins v. Currin, supra; Coble v. Coble, 229 N. C. 81, 47 S. E. 2d 798."

POINT I

The North Carolina decision is in conflict with decisions of the United States Supreme Court.

The jurisdiction of the Court of any State to render a valid divorce decree affecting marital status, alimony and custody of children has never been questioned where husband and wife appeared or were served in the state (*May* v. *Anderson*, 345 U. S. 528). Jurisdiction *in personam* is essential where the decree purports to affect alimony or custody (*Estin* v. *Estin*, 334 U. S. 541; *May* v. *Anderson, supra*). But where there is personal jurisdiction of both parties, the power of the Court to dispose of all of the issues incident to the divorce proceedings, including alimony and custody, has never been challenged (*Estin* v. *Estin, supra; May* v. *Anderson, supra*).

In respect of custody, the Supreme Court has equated "the jurisdictional requirements for a custody decree to those for an *in personam* judgment" (Mr. Justice Jackson, dissenting, in *May* v. *Anderson, supra*). The decisions which have had the effect of equating these jurisdictional requirements, all of which were ignored by the North Carolina Supreme Court, may be briefly reviewed.

In *Estin* v. *Estin*, 334 U. S. 541, an alimony decree rendered in favor of the wife in a New York separation suit was followed by a Nevada divorce obtained by the husband, without personal service of the wife, which purported to nullify the New York alimony order. Holding that this could not be accomplished without personal jurisdiction of the wife, the Court said, at pages 548, 549:

> "The Nevada decree that is said to wipe out respondent's claim for alimony under the New York judgment is nothing less than an attempt by Nevada to restrain respondent from asserting her claim under that judgment. That is an attempt to exercise an *in personam* jurisdiction over a person not before

> the court. That may not be done. Since Nevada had no power to adjudicate respondent's rights in the New York judgment, New York need not give full faith and credit to that phase of Nevada's judgment. A judgment of a court having no jurisdiction to render it is not entitled to the full faith and credit which the Constitution and statute of the United States demand. *Hansberry* v. *Lee*, 311 U. S. 32, 40-41; *Williams* v. *North Carolina*, 325 U. S. 226, 229, and cases cited."

Similarly, in *Armstrong v. Armstrong*, 350 U. S. 568 the Court held that a Florida divorce, obtained on constructive service, which made no alimony award, could not preclude the wife, an Ohio resident, from obtaining an alimony award in Ohio, as an incident to her divorce action in that State, though no divorce decree could be rendered in Ohio in view of the valid Florida divorce. In its opinion, the Court said, at page 576:

> "It has been the constitutional rule in this country at least since Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565, decided in 1878, that non-residents cannot be subjected to personal judgments without such service or appearance. We held in Estin v. Estin, 334 U. S. 541, 92 L. ed. 1561, 68 S. Ct. 1213, 1 A. L. R. 2d 1412, that an alimony judgment was this kind of 'personal judgment.'"

In *May* v. *Anderson*, 345 U. S. 528, cited by the United States Supreme Court in the *Armstrong* case, *supra*, the Court "equated" the jurisdictional requirements of alimony cases to custody cases. There the parties were married and lived in Wisconsin until they separated by consent in December, 1946, the wife taking the children to Ohio to consider "her future course". When she decided not to return to Wisconsin, the husband brought an action for divorce in Wisconsin seeking custody of the children, in which she was not personally served. The Wisconsin Court entered a divorce decree, awarding custody of the children to the husband. Armed with this decree, the husband obtained the children, bringing them back to Wisconsin.

Some years later, he brought them to Ohio for a visit with the mother, whereupon she refused to surrender them. The husband then brought a *habeas corpus* proceeding in Ohio. The Ohio Court directed the wife to surrender the children to the husband, holding the Wisconsin judgment binding under the full faith and credit clause.

The Supreme Court reversed, ruling that the original Wisconsin decree was not binding upon the wife because she had not been served with process in Wisconsin. The fact that the children were domiciled in Wisconsin and that the parties had stipulated that the domicile of both parents continued to be in Wisconsin, was held not sufficient to require enforcement of the Wisconsin decree in the absence of personal service upon the wife. In its opinion, the Court said, per Mr. Justice Burton, at page 534:

> "In the instant case, we recognize that a mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony.
>
> "In the instant case, the Ohio courts gave weight to appellee's contention that the Wisconsin award of custody binds appellant because, at the time it was issued, her children had a technical domicile in Wisconsin, although they were neither resident nor present there. We find it unnecessary to determine the children's legal domicile, because, even if it be with their father, that does not give Wisconsin, certainly as against Ohio, the personal jurisdiction that it must have in order to deprive their mother of her personal right to their immediate possession."

The Court accordingly held that Wisconsin was without jurisdiction to make a custody award, not because the children were in Ohio, but because the wife was.

Thus, the jurisdictional requirement of personal service upon, or an appearance by, the non-resident spouse, established in the alimony cases (*Estin* v. *Estin*, 334 U. S. 541)

has expressly been made applicable to custody cases (*May* v. *Anderson, supra*); and as recently as April 1956, the Supreme Court cited *May* v. *Anderson*, a custody case, in dealing with an alimony award (*Armstrong* v. *Armstrong, supra*). Thus, as was pointed out by Mr. Justice Jackson in his dissenting opinion in *May* v. *Anderson*, the Supreme Court has "equated" the jurisdictional requirements of alimony and custody cases, stating (345 U. S. at page 540):

> "In spite of the fact that judges and law writers long have recognized the similarity between the jurisdictional requirements for divorce and for custody, this decision appears to equate the jurisdictional requirements for a custody decree to those for an *in personam* money judgment."

In *Vanderbilt* v. *Vanderbilt*, 354 U. S. 416, this Court applied the *Estin* rule to a case in which the wife's right to alimony had not been reduced to judgment at the time of the Nevada divorce decree rendered without personal jurisdiction over her, and held enforceable accordingly a New York alimony order rendered in a subsequent separation action in New York. In his dissenting opinion in that case, Mr. Justice Frankfurter, differing from the majority of the Court as to the extraterritorial effect of the Nevada divorce decree, took occasion to point out that custody was a different matter, indicating that when children were involved, personal jurisdiction of both parties would be deemed a constitutional prerequisite. Mr. Justice Frankfurter stated further that while a divorce decree may terminate the relations of the parties as husband and wife, the decree could not terminate their relations to their children. Parental rights, therefore, are not to be affected except when the parents are before the Court. Clearly, however, when the parents are, in fact, before the Court in a divorce suit, there can be no question of its jurisdiction to make any order with respect to the custody of the children as an incident to the divorce proceeding.

While the absence of the child from the State is therefore irrelevant in a divorce proceeding, it does not follow that the presence of the child in North Carolina is without jurisdictional significance. A North Carolina court, acting in its capacity as *parens patriae*, may intervene in the interests of the child upon the basis of changed circumstances since the New York decree. This is a parallel and independent basis of jurisdiction, apart from the custody jurisdiction incidental to a divorce proceeding (*Finlay* v. *Finlay*, 240 N. Y. 249). The physical presence of the child within the state serves as the origin of this type of jurisdiction, which is founded upon the power of a state to regulate the custody of infants found within its territory. It has no relation to custody awards in divorce proceedings. In *Finlay* v. *Finlay*, *supra*, the Court said, per Cardozo, J., at pages 431, 432:

> "The jurisdiction of a State to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless (*Woodworth* v. *Spring*, 4 Allen, 321, 323; *White* v. *White*, 77 N. H. 26; *Hanrahan* v. *Sears*, 72 N. H. 71, 72; *Matter of Hubbard*, 82 N. Y. 90, 93).
>
> For this, the residence of the child suffices though the domicile be elsewhere (*Matter of Hubbard*, *supra*). But the limits of the jurisdiction are suggested by its origin. The residence of the child may not be used as a pretense for the adjudication of the status of parents whose domicile is elsewhere, nor for the definition of parental rights dependent upon status (cf. *Kline* v. *Kline*, 57 Ia. 386; *Griffin* v. *Griffin*, 93 Oreg. 78; *Lanning* v. *Gregory*, 100 Tex. 310; *Blackinton* v. *Blackinton*, 141 Mass. 432, 436; *Matter of Standish*, 197 App. Div. 176). Parents so situated must settle their controversies at home. Our courts will hold aloof when intervention is unnecessary for the welfare of the child.
>
> "We think the welfare of children does not appear from the complaint to be the basis of the husband's

prayer for an apportionment of parental rights, nor is an action between contending spouses the proper form of remedy.

"One situation there is, indeed, in which such an inquiry will be pursued in connection with an action between the spouses, or as a supplement thereto. The statute permits a judgment fixing the custody of children as an incident to a judgment for divorce or separation."

The physical presence of the child suffices as a ground of jurisdiction where intervention is necessary for the child's protection. It is not material where the parental rights of custody are to be adjudicated as incident to a divorce action.

The jurisdiction which may be exercised by the Court in the face of a prior foreign custody award was described in *Halvey* v. *Halvey*, 330 U. S. 610. There, the parties having been married in New York, the wife took their child to Florida, established her residence there and obtained a decree of divorce which awarded her custody of the child. The day before the Florida decree was entered, the husband took the child back to New York without the wife's knowledge. Thereupon, the wife instituted habeas corpus proceedings in New York, seeking to enforce the Florida decree awarding her custody. The United States Supreme Court held that the New York Court had the same power to modify the custody decree as the Florida court would have had on the basis of proof not previously considered. In defining the proper scope of the jurisdiction exercisable by the New York Court under the full faith and credit clause, the Court said, per Mr. Justice Douglas, at page 613:

"Facts which have arisen since the original decree are one basis for modification of the custody decree. *Frazier* v. *Frazier*, 109 Fla., p. 168, 147 So., p. 465; *Jones* v. *Jones*, 156 Fla. 524, 527, 23 So. 2d 623, 625. But the power is not so restricted. It was held in *Meadows* v. *Meadows*, 78 Fla. 576, 83 So. 392-393, that 'the proper custody of the minor child is a

> proper subject for consideration by the chancellor at any time, even if facts in issue could have been considered at a previous hearing, *if such facts were not* presented or considered at a former hearing'."

This, the Court held, constituted compliance with the full faith and credit clause, stating (p. 614):

> "So far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York may do. * * * But a judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered."

This does not mean that the issues tried in New York may be relitigated in North Carolina. The policy of the full faith and credit clause is the restriction of repetitive litigation. In *Halvey* v. *Halvey, supra*, Mr. Justice Frankfurter stated (p. 616):

> "The constitutional policy formulated by the Full Faith and Credit Clause cannot be fitted into tight little categories or to abstract generalities. That policy was the nation-wide restriction of litigousness, to the extent that States, autonomous for certain purposes, should not be exploited to permit repetitive litigation. In substance, the Framers deemed it against the national welfare for a controversy that was truly litigated in one State to be relitigated in another. Such limitation does not foreclose inquiry into what was litigated and what was adjudicated. The scope of the Full Faith and Credit Clause is bounded by its underlying policy and not by procedural considerations unrelated to it."

In applying this constitutional prohibition against duplicate litigation in custody matters, Mr. Justice Frankfurter stated (617):

> "The child's welfare must be the controlling consideration whenever a court which can actually lay hold

> of a child is appealed to on behalf of the child. Short of that, a valid custodial decree by Florida could not be set aside simply because a New York court, on independent consideration, has its own view of what custody would be appropriate."

It is respectfully submitted that the decision of the North Carolina Court has, in effect, set aside the New York order merely because the North Carolina Court "on independent consideration (had) its own view of what custody would be appropriate." No reference was made in the decision of the North Carolina Supreme Court to any intervening change of circumstances warranting a reversal of the New York decree awarding custody to the wife. The fact that a stepson of Brewer, Sr., had moved out was not referred to by the Supreme Court.

On the contrary, both the Superior Court and the Supreme Court (*supra*, pp. 7, 8) stated that they were not required to give any effect to the New York judgment. This is a palpable violation of the Full Faith and Credit Clause.

The question as to the effect upon jurisdiction of the absence of the child from the forum state was expressly reserved in *Halvey* v. *Halvey*, *supra*, where the husband had "abducted" the child to New York the day before the Florida decree was entered.

The Supreme Court stated at pages 615, 616:

> "The narrow ground on which we rest the decision makes it unnecessary for us to consider several other questions argued, *e.g.*, whether Florida at the time of the original decree had jurisdiction over the child, the father having removed him from the State after the proceedings started but before the decree was entered; * * * whether the State which has jurisdiction over the child may, regardless of a custody decree rendered by another State, make such orders concerning custody as the welfare of the child from time to time requires. On all these problems we reserve decision."

It is respectfully submitted that there is no justification, in principle, for a requirement of the physical presence or domicile of the child where the Court has jurisdiction of the parents in a divorce proceeding. Jurisdiction basically is a matter of due process, involving essentially notice and hearing (*Pennoyer* v. *Neff*, 95 U. S. 714; *Williams* v. *North Carolina*, 317 U. S. 287). As was stated by Mr. Justice Frankfurter in *Vanderbilt* v. *Vanderbilt*, *supra*, dissenting at pages 423-4: "The crucial question is: what is the fair way to proceed against these interests?"

The child clearly has no need for notice or hearing, where his parents are before the Court.

It is accordingly respectfully submitted that the decision of the North Carolina Supreme Court violates the Full Faith and Credit Clause of the United States Constitution.

POINT II

The question of the jurisdiction of the New York court is *res adjudicata*.

Moreover, the question of the jurisdiction of the New York Court was not open to defendant in the North Carolina proceeding. The Brewers participated in the New York proceeding and had full opportunity to contest that Court's jurisdiction. Having failed to do so they are precluded by the New York determination (*Sherrer* v. *Sherrer*, 334 U. S. 343, 351; *Johnson* v. *Muelberger*, 340 U. S. 581; *Cook* v. *Cook*, 342 U. S. 126; *Davis* v. *Davis*, 305 U. S. 32). Defendant's neglect in New York is not the basis for attacking the New York decree in North Carolina. In *Sherrer* v. *Sherrer*, *supra*, the Court said at page 352:

> "If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own. We do not believe that the dereliction of a defendant under such circumstances should be permitted to provide a basis for subsequent attack in

> the courts of a sister State on a decree valid in the State in which it was rendered."

The Court pointed out that the doctrine of *res judicata* applies to adjudications relating either to jurisdiction of the person or of the subject matter where the parties were given full opportunity to litigate. The Court said at page 350:

> "Insofar as cases originating in the federal courts are concerned, the rule has evolved that the doctrine of *res judicata* applies to adjudications relating either to jurisdiction of the person or of the subject matter where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate."

Applying this general principle to cases arising under the full faith and credit clause, the Court said at pages 351, 352:

> "We believe that the decision of this Court in the *Davis* case and those in related situations are clearly indicative of the result to be reached here. Those cases stand for the proposition that the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree."

In *Johnson* v. *Muelberger*, 340 U. S. 581, the Court quoted the following principle from *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 78 (340 U. S. p. 585):

> "'One trial of an issue is enough. "The principle of *res judicata* apply to questions of jurisdiction as well as to other issues," as well to jurisdiction of the subject matter as of the parties.'"

POINT III

The validity of the New York judgment, under New York law, has not been challenged.

There is no doubt that the modification of the custody award is valid in New York, despite the absence of the child at the time of the modification (*May* v. *May*, 233 N. Y. App. Div. 519 (1st Dept.); *People* v. *Winton*, 34 Misc. 21, aff'd 61 App. Div. 615; *Grenier* v. *Grenier*, 175 Misc. 406; and see *Langerman* v. *Langerman*, 303 N. Y. 465; *Ansorge* v. *Armour*, 267 N. Y. 492, 498):

In *May* v. *May*, *supra*, the Court said, at page 520:

> "It is true that where both parties are before the court, custody of a child or children without the jurisdiction may be made."

POINT IV

The North Carolina Decisions.

Although the decisions of the North Carolina courts are, of course, not binding here, we submit herewith a brief summary of pertinent North Carolina decisions for the purpose of establishing that even in North Carolina, there is no actual decision that a foreign custody award, valid in the State where made, will be disregarded in North Carolina merely because the child was not present in the State. Prior custody awards have been held not controlling in North Carolina because of changed circumstances since the prior decree (*Richter* v. *Harmon*, 243 N. C. 373, 90 S. E. 2d 744; *Ex parte Alderman*, 157 N. C. 507, 73 S. E. 126); or because the prior award was based on a contract between the parties (*Gafford* v. *Phelps*, 235 N. C. 218, 69 S. E. 2d 313); or because one of the parties was not personally served (*Coble* v. *Coble*, 229 N. C. 81, 47 S. E. 2d 798; *Burrowes* v. *Burrowes*, 210 N. C. 788, 188 S. E. 648); or because

the husband and child were not domiciled in the foreign State when the divorce action was originally instituted (*Hoskins* v. *Currin*, 242 N. C. 432, 88 S. E. 2d 228); or because a North Carolina award, and not that of a sister State, was involved (*Weddington* v. *Weddington*, 243 N. C. 702, 92 S. E. 2d 71).

In *Richter* v. *Harmon*, 243 N. C. 373, 90 S. E. 2d 744, the parties were divorced in Florida, the husband being served by publication and the judgment awarding custody of the child to the wife. In the following year, the wife went to Washington, D. C. to seek employment, and with her consent, the husband brought the child to North Carolina.

In 1955, after the wife had remarried in Maryland, she brought a proceeding in North Carolina to enforce the Florida judgment awarding her custody. The actual holding was that the Florida judgment was entitled to full faith and credit in North Carolina as to all matters previously adjudicated. The Court said (90 S. E. 2d), at page 748:

> "But, in disposing of the custody of the minor child in controversy, the Florida decree awarding her custody to the petitioner is entitled to full faith and credit as to all matters existing when the decree was entered and which were or might have been adjudicated therein."

The Court also held, however, that since the child was then in North Carolina, the Court had the right to consider "any change of circumstances that have arisen since the entry of the Florida decree".

It is significant that the Florida judgment was deemed binding despite the absence of personal service on the husband. To this extent, the decision conflicts with *May* v. *Anderson*, 345 U. S. 528.

Ex parte Alderman, 157 N. C. 507, 73 S. E. 126, merely holds that when a child becomes a citizen of North Caro-

lina, its courts may exercise custody jurisdiction upon the basis of changed circumstances since the prior decree. There, the parties were married and divorced in Florida, the decree awarding custody of the child, then living in North Carolina, to the wife and providing certain visitation privileges to the husband. The husband brought a writ of habeas corpus in North Carolina to enforce his visitation privileges, relying upon the Florida decree. The facts established that the child's health at the time of the application was such that it would endanger its welfare to bring the child "from the mountains of western North Carolina to the State of Florida". Upon the basis of this proof, not presented to the Florida court, the husband's writ was dismissed, the Court holding that the Florida decree did not "give a husband a vested interest in the child". The Court said (73 S. E. page 129):

> "The child is *now* a citizen of North Carolina, and as such peculiarly under its guardianship, and the courts of this state will not remand it to the jurisdiction of another state, especially where, as in this case, it is so manifestly against the true interests of the child. 'Minors are the wards of the nation, and even the control of them by parents is subject to the unlimited supervisory control of the State'." (Citing authorities.)

Coble v. *Coble*, 229 N. C. 81, 47 S. E. 2d 798, vacated a custody award made without personal service on the wife. There the plaintiff husband, a North Carolina resident, sued for divorce and custody of his two minor children in North Carolina, although at the time the action was commenced, his wife and children were not within the State and the wife was not served. Nevertheless, an order was made awarding custody of the children to the plaintiff. The Supreme Court vacated this order upon the ground that the wife had not been served with process. The Court said, 47 S. E. 2d, at page 800:

> "At the time the order was issued, the res was not within the jurisdiction of the court. *The defendant-*

> *custodian was not served with notice* and was not accorded an opportunity to be heard. This runs counter to the genius of a free people and will not be permitted. The order is void. * * *
>
> "'It lies at the foundation of justice, that every person who is to be affected by an adjudication should have the opportunity of being heard in defense, both in repelling the allegations of fact, and upon the matter of law * * *.' Pridgen v. Pridgen, supra (203 N. C. 533, 166 S. E. 594)." (Our italics.)

Indeed, the Court indicated that had the wife been served, jurisdiction could have been exercised even in the absence of the children. Thus, the Court stated (page 801):

> "If both parents are in court and subject to its jurisdiction, an order may be entered, in proper instances, binding the parties and enforceable through its coercive jurisdiction. McRary v. McRary, supra. But such is not the case here. Neither the infants *nor* their mother was subject to the jurisdiction of the court at the time the order was entered." (Our italics.)

The Court, in the *Coble* case, therefore clearly held that where "both parents are in Court and subject to its jurisdiction", a custody award may be made, enforceable through the coercive jurisdiction of the Court, irrespective of the absence of the children.

In *Burrowes* v. *Burrowes*, 210 N. C. 788, 188 S. E. 648, a custody award also made without service of process upon the wife, was similarly vacated. Moreover, neither the plaintiff, the defendant, nor the child were residents of North Carolina.

In *Gafford* v. *Phelps*, 235 N. C. 218, 69 S. E. 2d 313, the parties were married in North Carolina in 1941, where they resided until 1944, when they went to live in Alabama with their child. On June 18, 1948, a separation agreement was entered into in Alabama, which provided for a sharing

of custody between the parties, which agreement was embodied in an Alabama divorce decree, rendered on June 25, 1948, the child being in North Carolina at the time of the decree. The Court pointed out that the prior award had been founded on a contract of the parties, which could not bind the Court in its review of evidence submitted bearing upon the welfare of the child. It said (69 S. E. 2d, at page 316):

> "The welfare of the child should be the paramount consideration which guides the court in making an award of custody. (Citing cases.)"

This case is squarely within the rule of *Halvey* v. *Halvey, supra*, which authorizes the Court to take proof, in the face of a prior custody award, where the evidence has not previously been considered. Obviously, where the custody award is based upon the contract of the parties, there has been no prior judicial inquiry into the facts.

In *Hoskins* v. *Currin*, 242 N. C. 432, 88 S. E. 2d 228, the parties were married in California in 1947, moved to Washington, D. C., in 1951, where they separated, and in 1952, the wife, having returned to California, brought suit for divorce there. The husband cross-claimed for divorce and in 1953, judgment was rendered in his favor, custody of the child being awarded to him, and since he was in the Marines, the Court directed that the child stay in North Carolina with the husband's brother and sister-in-law. In 1954, after the wife remarried, the California Court, on motion by the wife, modified its previous order and awarded her custody. The California order was held not entitled to full faith and credit in North Carolina because husband and child had been domiciled in North Carolina prior to the institution of the California divorce suit. The Court said (88 S. E. 2d), at page 232:

> "In the light of the finding of the court below that North Carolina is the legal domicile of the intervenor who has had the legal custody of Rodney Alan

> Currin since 16th March, 1953; and the further fact that he has been in the physical custody of the defendants in Granville County, North Carolina, since the 2nd day of March, 1952, which antedates the institution of the California action, we hold the California decree is not binding on the courts of this State."

This case, therefore, merely holds that North Carolina is not bound by the California modification of its custody award, where neither the husband nor the child were domiciled in California when the divorce suit was originally instituted.

In *Weddington* v. *Weddington*, 243 N. C. 702, 92 S. E. 2d 71, the parties, residents of North Carolina, separated in 1952 and in a habeas corpus proceeding, custody of the two children was divided between husband and wife, one to each. In the divorce action brought in North Carolina, the plaintiff wife moved to obtain custody of the child previously awarded her husband, the child being then in South Carolina. Her motion was granted, the husband being ordered to bring the child to North Carolina. Holding that the Court had no power to make this direction, the Court said (92 S. E. 2d) at page 74:

> "If both parents are in court and subject to its jurisdiction, an order may be entered in proper instances, binding the parties and enforceable through its coercive jurisdiction. McRary v. McRary, supra; Coble v. Coble, supra. On the other hand, if the child is not within the jurisdiction of the court, the Court is without power to make an order awarding the child's custody. Gafford v. Phelps, 235 N. C. 218, 69 S. E. 2d 313 and cases cited."

It may well be that the courts of North Carolina have determined, as a matter of discretion, not to exercise their custody jurisdiction where the child is not within North Carolina. Such a determination clearly does not bind any other State.

It should be emphasized that there is no North Carolina decision in which the Court has had occasion to pass upon the binding effect of a foreign custody award where the issue of custody was litigated and all of the facts extensively reviewed in a closely contested proceeding.

Nor has there been any decision in North Carolina involving the modification by a foreign tribunal of a judgment originally rendered by that court in a divorce action where both the parties and the child were then before the court.

Particular emphasis is laid upon the fact that the New York judgment here involved represents a modification of a prior judgment rendered when husband, wife and child were all domiciled and present in New York and the modification is pursuant to a retained statutory authority to modify the judgment. On this point, the overwhelming weight of authority is to the effect that the courts have a continuing jurisdiction to modify provisions relating to custody of children contained in final divorce judgments, which is not defeated by the removal of the child from the State (*Andrews* v. *Andrews*, 15 Ia. 423; *Meredith* v. *Krauthoff*, 191 Mo. App. 149, 177 S. W. 1122; *Dixon* v. *Dixon*, 76 N. J. Eq. 364, 74 Atl. 995; *Newman* v. *Newman*, 105 App. Div. 63, 93 N. Y. Supp. 847; *Berry* v. *Berry*, 60 N. D. 353, 234 N. W. 52; *Kern* v. *Lindsey*, 182 Va. 775, 30 S. E. 2d 707; *Coats* v. *Coats*, 161 Kan. 307, 167 Pac. 2d 290; *Drew* v. *Drew*, 186 S. W. 2d 858 (Mo. App.); *Stetson* v. *Stetson*, 80 Me. 483, 15 Atl. 60; *Hersey* v. *Hersey*, 271 Mass. 545, 171 N. E. 815; *Tinker* v. *Tinker*, 144 Okla. 97, 290 P. 185).

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of North Carolina should be reversed and a judgment should be made by this Court decreeing that the order of the New York Supreme Court, awarding custody of the child of the parties to appellant, is entitled to full faith and credit in North Carolina.

Respectfully submitted,

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Appendix A

(Opinion of Supreme Court of North Carolina)

IN THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM—1957

No. 168—Northampton

AIDA S. KOVACS

—v.—

GEORGE A. BREWER, SR.

Appeal by petitioner from Stevens, J., at Chambers in Winton, North Carolina, 12 September 1956. From Northampton.

This is a proceeding brought pursuant to GS 50-13 to determine a dispute concerning the custody of the minor child of the parents who were divorced by a decree of the State of New York.

The order entered pursuant to the hearing in Winton, North Carolina, on 12 September 1956, was signed by consent of counsel at Halifax on 10 December 1956.

This matter was heard before his Honor Henry L. Stevens, Jr., Judge regularly assigned and holding courts of the Sixth Judicial District, at which time and place the petitioner was present and represented by counsel, and the respondent was present and represented by counsel. The minor child, who is the subject of this controversy, was also present, as was her father, George A. Brewer, Jr.

By direction of the court the matter was heard solely on affidavits, pleadings, certain stipulations and petitioner's

exhibits, and upon consideration thereof the court found the facts as follows:

"1. That George A. Brewer, Jr., father of Jane Elizabeth Brewer, the minor child who is the subject of this controversy, enlisted in the U. S. Navy in 1946 and has been a member of such service since that date.

"2. That on April 18, 1945, the said George A. Brewer, Jr. married Aida Speciale (now Aida Kovacs). On May 30, 1946, a child, Jane Elizabeth Brewer, was born to said marriage. That they lived together in the marital relation until some time in 1950. That on July 31, 1950, George A. Brewer, Jr. instituted an action for divorce against his wife on the grounds of adultery in the Supreme Court of the State of New York in and for the County of New York. That on January 17, 1951, said Court entered a decree of divorce in favor of George A. Brewer, Jr. against his said wife on the grounds of adultery with Joseph Kovacs, and awarded the custody of the child, Jane Elizabeth Brewer, to George A. Brewer, Sr., the father of George A. Brewer, Jr., and the grandfather of said child.

"3. That immediately after rendition of the decree awarding custody of said child, the said Aida Brewer went into hiding, taking the child with her, and it was not until on or about September 6, 1951 that said father or grandfather were able to find the child and her mother. They were found living with Joseph Kovacs at 21 James Avenue in Jersey City and in order to gain the physical custody of the said child, it was necessary for the parent and grandparent to obtain a writ of habeas corpus in the Superior Court Chancery Division of Jersey City. Upon a hearing on the return of said writ, physical

possession and custody of said minor was granted to the father and grandfather of said child.

"4. That immediately thereafter, the said grandfather returned to his home in Gaston, Northampton County, North Carolina, bringing with him the said Jane Elizabeth Brewer. The domicile of the said George A. Brewer, Sr. is now and has been for more than twenty years, said Town of Gaston, Northampton County, North Carolina.

"5. That since said time the said Jane Elizabeth Brewer has been continuously residing in the home of her grandfather, George A. Brewer, Sr., in Gaston, Northampton County, North Carolina, and at no time has been out of the State of North Carolina.

"6. That immediately following the divorce decree on January 17, 1951, George A. Brewer, Jr. left the State of New York with the intention not to return, and has continuously resided since then in Gaston, North Carolina except for the times that he was on duty in the Navy; has voted in elections held in Gaston Precinct in 1952, 1954 and 1956; that since said time, and in the periods when he owned an automobile, such car has been registered in North Carolina with a North Carolina license plate and the same in the Town of Gaston; that since he left New York, he has paid his Federal income tax through the Greensboro, North Carolina office; that since he left New York, he has spent his leaves at his home in Gaston, North Carolina with his father, stepmother and child. That at all times since he left the State of New York, and now, George A. Brewer, Jr., has been and is a resident of and domiciled in Gaston, North Carolina.

"7. That George A. Brewer, Jr. is a Machinist Mate First Class in the U. S. Navy with a base pay

of $258.00 per month, plus $77.10 for the maintenance of Jane Elizabeth Brewer. That he makes an allotment and pays monthly to his father the sum of $157.10 for the support and maintenance of Jane Elizabeth Brewer.

"8. That on October 2, 1951, and again on November 17, 1952, the petitioner made application in the Supreme Court of the State of New York for the modification of said divorce decree seeking custody of said child for the petitioner. Both applications were denied. That in July 1954, the petitioner married Joseph Kovacs, the person who was named as co-respondent in the divorce action hereinabove referred to, and the person whom the court found as the co-respondent. That in November 1954, the petitioner again applied to said New York Court for a modification of the divorce decree seeking custody of the child for herself. That upon a hearing upon said petition, the court entered a decree awarding such custody. At said hearing, neither George A. Brewer, Sr. nor George A. Brewer, Jr. appeared in person but did through counsel and each submitted affidavits which were considered by the court. The minor child, Jane Elizabeth Brewer, was not present in the State of New York at the time of said hearing, or at any time since her removal from said State in 1951. At the time of said hearing, and since 1951, she has been a resident of and domiciled in Gaston, North Carolina. That neither George A. Brewer, Sr. nor George A. Brewer, Jr. has been in the State of New York since 1951.

"9. That petitioner filed her petition in the present case in the Superior Court of Northampton County on the 24th day of February 1956, under the provisions of Section 50-13 of the General Statutes of North Carolina; summons was personally served

on the defendant on February 29, 1956; the defendant filed answer on March 29, 1956.

"10. That George A. Brewer, Sr. is 64 years of age and for more than one year has not required any care for a coronary artery condition or for a diabetic condition. He is able to work, and properly supervise the maintenance and care of his granddaughter, Jane Elizabeth Brewer; that he is senior trustee of the Board of Stewards, teacher of the adult Bible Class of his church school and an active and reliable layman of his church. He is vitally interested in the public schools of his community and in consequence of such church and school interest and activity the environment of his home is suitable for the upbringing of a child; that George A. Brewer, Sr. owns his residence. It is situated in the corporate limits of the Town of Gaston and located tastefully on a hill, is small, but adequate and neat. The home is attractive in appearance, comfortable and modest. It is complete with bath, hot and cold water, is heated with an oil heater floor furnace and has a gas heater in the fireplace which may be used as auxiliary heat in case of severe weather.

"That Mrs. George A. Brewer, Sr. is a graduate nurse of the Roanoke Rapids, N. C. Hospital, having graduated in 1927; that she is peculiarly qualified to give attention and care to said minor, Jane Elizabeth Brewer; that she has shown, and continues to show, affection and interest in said minor; that she is a teacher of small children in her church school. She is a gentle, loving person, fully qualified in every way to give Jane Elizabeth Brewer motherly care and Christian nurture and training that she needs at this period of her life.

"11. That Jane Elizabeth Brewer was about 5½ years of age when her custody was awarded to her grandfather, George A. Brewer, Sr.; that she has lived continuously since that time with her grandfather and step-grandmother; that she has been a constant attendant at church services and at church school. In church school she has been awarded a pin for uninterrupted attendance for a period of more than five years; that she has been a constant attendant in the local elementary school where she has proven to be a bright and attractive child. She has done well in the scholastic work and has been one of the top-ranking pupils. In 1954, she voluntarily made a public confession of Christ and joined the church of her grandparents of her own free will.

"Said minor is provided with a swing, toys, dolls and doll house and a playhouse. She has many young friends with whom she plays and visits. She has made and enjoys friends in the Town of Gaston not only among those of her age, but with adults also. Her health is good and she has had the doctor only twice since 1951, and that was for a minor upset stomach which lasted only a day. She has grown several inches in height and has gained in weight.

"She has advantages equal to those of any child in Gaston, good schools, supervised playground, recreational facilities, a good home and church training, and above all a sense of being loved and wanted.

"12. That in 1954, when the said New York decree was entered, there was residing in the home of George A. Brewer, Sr., himself, his wife and the son of Mrs. Brewer; that the son of Mrs. Brewer is no longer residing in said home, and it is now occupied only by Mr. and Mrs. George A. Brewer, Sr. and the said Jane Elizabeth Brewer. That the

removal of the son of Mrs. George A. Brewer, Sr. provides more space in the home for the convenience and comfort of said child, and lessens the responsibility of the said Mr. and Mrs. George A. Brewer, Sr. in providing maintenance and supervision for said minor.

"13. That the petitioner, Aida Kovacs, is not a fit and proper person to have the care, custody and control of the minor, Jane Elizabeth Brewer.

"14. That George A. Brewer, Sr. is a man of excellent character, good habits and conduct, and is a fit and suitable person to have the care, custody and control of the minor, Jane Elizabeth Brewer.

"15. That the welfare, interest and development of the child will be materially promoted by allowing her to remain in the custody of George A. Brewer, Sr. and in the environment to which she has become accustomed and upon which in a measure she depends."

The decree entered pursuant to the above findings, in pertinent part, is as follows:

"1. That this Court, in passing upon the the care, custody and control of Jane Elizabeth Brewer, is not bound by or required to give effect to the decree of the Court of the State of New York made in 1954 and hereinbefore referred to.

"2. That the petitioner's petition to be awarded the care, custody and control of the said Jane Elizabeth Brewer is hereby denied.

"3. That the care, custody and control of the said Jane Elizabeth Brewer is hereby awarded to the respondent, George A. Brewer, Sr."

The petitioner appeals, assigning error.

SYLVESTER & HALMOFF, of the New York Bar, SANFORD, PHILLIPS, MCCOY & WEAVER, for petitioner;

GAY & MIDYETTE, ERIC NORFLEET, for respondent.

DENNY, *J.* The appellant's first assignment of error is based on a single exception to the court's findings of fact numbered one through fifteen and does not point out wherein the findings of fact are not supported by the evidence. Therefore, the exception is broadside, and this assignment of error presents nothing for review except whether or not the court's conclusions of law are supported by its findings. Winborne v. Stokes, 238 N. C. 414, 78 S. E. 2d 171; Burnsville v. Boone, 231 N. C. 577, 58 S. E. 2d 351.

The second assignment of error is based on an exception to his Honor's conclusion of law to the effect "that this court, in passing upon the care, custody and control of Jane Elizabeth Brewer, is not bound by nor required to give effect to the decree of the Court of the State of New York made in 1954, * * *."

Irrespective of the failure of the appellant to challenge by proper exceptions the sufficiency of the evidence to support the court's findings in the hearing below, we are of the opinion that the findings are supported by competent evidence and that they support the court's conclusion of law challenged by the second assignment of error, and we so hold. Hoskins v. Currin, 242 N. C. 432, 88 S. E. 2d 228.

The respondent, George A. Brewer, Sr., having been found to be a citizen and resident of North Carolina, domiciled in said State, to whom the custody of Jane Elizabeth Brewer, then 5½ years of age, was awarded by the New York Court on 17 January 1951; and the said minor child having been a resident in the home of her grandfather, George A. Brewer, Sr., since September 1951; and her father, George A. Brewer, Jr., having been domiciled in North Carolina since immediately after January 1951, we

hold, in the light of these findings, that the courts of North Carolina have the power and authority to hear and determine the question of the custody and welfare of the minor child involved herein. Richter v. Harmon, 243 N. C. 373, 90 S. E. 2d 744; Hoskins v. Currin, supra; Gafford v. Phelps, 235 N. N. 218, 69 S. E. 2d 313; In re Biggers, 228 N. C. 743, 47 S. E. 2d 32; In re Ogden, 211 N. C. 100, 189 S. E. 119; In re Alderman, 157 N. C. 507, 73 S. E. 126, 39 L. R. A. (N. S.) 988.

We further hold that the modification of the 1951 decree made by the New York Court in 1954, has no extra-territorial effect, and we are not bound by the full faith and credit clause of the Constitution of the United States, Article IV, section 1, to recognize and enforce the modified decree. In re Alderman, supra; In re Biggers, supra; Hoskins v. Currin, supra.

An action which relates to the custody of a child is in the nature of an *in rem* proceeding. Therefore, the child is the *res* over which the court must have jurisdiction before it may enter a valid and enforceable order. Weddington v. Weddington, 243 N. C. 702, 92 S. E. 2d 71; Richter v. Harmon, supra; Hoskins v. Currin, supra; Coble v. Coble, 229 N. C. 81, 47 S. E. 2d 798.

The Court below has found that the petitioner, Aida Kovacs, is not a fit and proper person to have the care, custody and control of the minor, Jane Elizabeth Brewer; on the other hand, it has found that George A. Brewer, Sr. is a man of excellent character, good habits and conduct and is a fit and suitable person to have the care and custoy of said minor child. The welfare of the child in controversies involving custody is the polar star by which the court must be guided in awarding custody. Smith v. Smith, 241 N. C. 307, 84 S. E. 2d 891; Griffin v. Griffin, 237 N. C. 404, 75 S. E. 2d 133; Gafford v. Phelps, supra; Walker v. Walker, 224 N. C. 751, 32 S. E. 2d 318; Story v. Story, 221 N. C. 114, 19 S. E. 2d 136.

The judgment of the court below is affirmed.